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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 983

Battle Mountain Company, Petitioner,

v.

Stewart L. Udall, Secretary of the Interior

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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No.

Battle Mountain Company, Petitioner,

v.

Stewart L. Udall, Secretary of the Interior

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Battle Mountain Company, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit. The Court below reversed the decision of the United States District Court for the district of Oregon. The District Court reversed the decision of the Secretary of the Interior on judicial review of his administrative action.

OPINIONS BELOW

The 1967 opinion of the Court of Appeals for the Ninth Circuit (Appendix A, infra, pp. A1-A13) is unreported, except in the slip opinion, Stewart L. Udall v. Battle Mountain Company No. 21,259, October 18, 1967.

The 1966 opinion of the United States District Court for the District of Oregon (Appendix B, infra, pp. A14-A28) is reported at 255 F. Supp. 382.

The 1963 opinion for the United States Department of the Interior, Office of the Secretary (Appendix C, infra, pp. A28-A32) is unreported.1/

The 1961 opinion of the United States Department of the Interior, Director, Bureau of Land Management (Appendix D, infra, pp. A33-A35) is unpublished.2/

The 1918 opinion of the Department of the Interior is unpublished. This opinion validated the right here under consideration and held that "the base is valid for the purpose of new selection by virtue of the contract with the Secretary of the Interior, the validity of which was recognized by the saving clause of the act of March 3, 1905 (33 Stat. 1264)".3/ C.R. 79.4/

1/ Unpublished copy may be obtained from United States Department of the Interior, Office of the Solicitor, A-29146, January 31, 1963, as per statement in index digest published by the Solicitor.

2/ Unpublished copy may be obtained from United States Department of the Interior, Director, Bureau of Land Management, Office of the Solicitor, Oregon 011230, July 28, 1961.

JURISDICTION

This Court may wish to correct the departure of the court below from the authoritative pronouncements of this Court which established settled rules of property affecting title to lands of the United States and its citizens. The particulars of such departure and reasons for granting certiorari are set forth under Argument.

The judgment of the United States Court of Appeals for the Ninth Circuit to be reviewed was dated and entered October 18, 1967. Rehearing was denied November 28, 1967. An order entered December 8, 1967, fixed January 3, 1968, as the time within which to file a petition for certiorari. Mandate was stayed until final disposition of this case by the Supreme Court of the United States.

Title 28 U.S.C. 1254 (1) as revised by the Act of June 25, 1948, Chapter 646 (62 Stat. 928) is believed to confer on the Supreme Court of the United States jurisdiction, in its discretion, to review this case by writ of certiorari.

CONTINUED 3/ Unpublished copy may be obtained from United States Department of the Interior, Director, Bureau of Land Management, Office of the Solicitor, W. H. Oliver, Attorney in fact for Santa Fe Pacific Railroad Company, decision of June 15, 1918.

4/ The record in this case is unprinted. The letters C.R. are followed by numbers to pages in the transcript of the record before the United States Court of Appeals for the Ninth Circuit filed herein.

QUESTIONS PRESENTED

1. Whether the Secretary of the Interior had authority in his discretion to extinguish Battle Mountain's rights to select 160 acres of lieu land for 160 acres of base land conveyed to the United States by Santa Fe Pacific Railroad Company, from whom Battle Mountain purchased the rights, by reason of the Director's unauthorized 1956 deed of the base land to Santa Fe, issued with knowledge that Santa Fe had sold its rights, when Battle Mountain duly recorded its rights under the Recordation Act of 1955, (69 Stat. 534), where the rights were based on contract with the United States ratified by the Act of 1905, (33 Stat. 1264), and were based upon a decision of the Secretary's predecessor in office which determined that the base lands were valid for a new selection of 160 acres from the public domain.

2. Whether legal and equitable title to the base lands remains vested in the United States since the Director's 1956 deed of the base lands to Santa Fe was unauthorized and void.

3. Whether Battle Mountain's rights to select 160 acres of lands from the public domain are floating rights,the same as a scrip right, freely assignable.

CONSTITUTION AND STATUTES

1. The Fifth Amendment to the Constitution of the United States providing due process, notice and hearing, and protecting property against taking without compensation is sufficiently familiar to the Court as not to require quotation.

2. Federal Statutes applicable to this case

are set forth in pertinent part in Appendix E hereto:

Act of June 4, 1897, (30 Stat. 36) A35
Act of March 3, 1905, (33 Stat. 1264) A36
Act of September 22, 1922, (42 Stat. 1017) A37
Act of April 28, 1930, Sec. 6, (46 Stat. 257) A38
Act of August 5, 1955, (69 Stat. 534) A39
Act of July 6, 1960, (74 Stat. 334, 335) A40
Act of August 31, 1964, (78 Stat. 751) A41

STATEMENT OF THE CASE

Battle Mountain purchased through mesne conveyances obligations of the United States, which were distributed to the public by Santa Fe Pacific Railroad Company. C.R. 2. Subsequent legislation has made these obligations payable at the election of the owner either in land or in money. Act of August 31, 1964, (78 Stat. 751) set out in Appendix E, p. A41.

These obligations exist by virtue of a contract made by former Secretary Hitchcock with the Santa Fe Pacific Railroad Company and others under which the United States acquired land needed for public purposes.5/ The contract was subsequently ratified by Congress.6/

5/ The report made by Secretary Hitchcock to the House of Representatives in 1906, House Document 613, 59th Congress, 1st Session, Cong. Doc. Ser. No. 4989, states the reasons for the formation of the consolidated San Francisco Mountains Forest

In part performance of the contract, the Santa Fe Pacific Railroad Company conveyed to the United States on November 24, 1908, 160 acres of base land7/ in consideration of the obligation of the United States to honor the right to select in lieu thereof an equal quantity of vacant, surveyed, non-mineral, public land open to homestead entry. C.R. 114.

The United States took possession of the base lands acquired under the contract and incorporated them with the San Francisco Mountains Forest Reserves into a consolidated forest reservation which also served the public purpose of protecting the watershed of the Salt River Valley. House Document 613, p. 14, Appendix F, p. A54; House Document 613, pP. 92-93 (not reproduced)

5/continued. Reserve, and sets forth the correspondence embodying the contract with the Santa Fe Pacific Railroad Company and others. Portions are reproduced in Appendix F, pp. A43-A58.

6/ Act of March 3, 1905,(33 Stat. 1264), is set out in Appendix E, p. A36. As the Secretary's instructions sent to local land officers May 16, 1905, stated, in providing that "the validity of contracts entered into by the Secretary of the Interior prior to the passage of this act shall not be impaired", Congress referred to, recognized and authorized the consummation of this agreement. Accordingly, the land officers were instructed to continue to accept relinquishments of base lands made under this contract by the Santa Fe Company. 33 L.D. 558, 559.

7/ Base lands conveyed were the South half of the Northwest quarter and the North Half of the Southeast quarter of Section 35, Township 19 North, Range 5 East of the Gila and Salt River Base and Meridian, Arizona.

The Government's acceptance of title to the 160 acres of base land which was the consideration for the selection rights here involved is evidenced by a departmental decision of June 15, 1918, which stated: "The base is valid for the purpose of a new selection by virtue of the contracts entered into by the Santa Fe Pacific Railroad Company with the Secretary of the Interior, the validity of which was recognized by the saving clause of the Act of March 3, 1905, (33 Stat. 1264)." C.R. 79.

Santa Fe received payment for this base land when it sold and assigned the selection rights and issued irrevocable powers of attorney, coupled with an interest, to select and to convey in its name the lieu land to be received from the United States.8/

In 1955, Congress recognized that many land selection rights, including lieu selection rights assertable under the act of March 3, 1905, had been transferred by inheritance, assignment or operation of law and were outstanding in the hands of unknown owners. The Recordation Act of August

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8/ The practice of "scripping" various kinds of selection rights by the sale of such powers of attorney was judicially recognized in Begue v. Grizzly Livestock & Land Co., 1 F. Supp. 229. In 1897 Act cases, where there was no contract with the Government and the relinquisher retained equitable title to the base land pending completion of an exchange with the Government, the sale of such powers of attorney carried with it all the rights of the vendor in and to the "base" land as well as in and to the "lieu" land after it was selected. Downer v. Grizzly Livestock & Land Co., 43 P 2d 843, 846.

5, 1955, (69 Stat. 534), Appendix E, p. A39, established a time limit within which such unknown owners must establish privity with the Government by recording their rights with the Bureau of Land Management. Battle Mountain duly recorded its ownership of the lieu selection rights here in question in 1957 while the invitation to unknown owners remained open. C.R. 2, 115, 116.

The Secretary's motions to dismiss plaintiff's complaint and in the alternative for summary judgment conceded for the purposes of the litigation the following facts: (1) that Battle Mountain was the real party in interest; (2) that Santa Fe had no interest in the selection rights; (3) that through mesne irrevocable powers of attorney Santa Fe had vested in Battle Mountain the sole and exclusive right to select lieu lands and dispose of them; (4) that Battle Mountain's ownership of the selection rights here in question were duly and regularly recorded with the Bureau of Land Management in accordance with the Recordation Act of 1955. C.R. 2, 115, 116.

Meanwhile, in spite of having been paid for the base lands involved here when it sold the powers of attorney, Santa Fe requested the United States to reconvey these lands to it so that Santa Fe might determine the parties entitled thereto. The request was made on the ground that the instruments by which it had transferred its interest in that portion of the contract, i.e., the powers of attorney to select and convey the lieu lands, had been lost. Santa Fe's letter of July 19, 1956, stated:

> "Since to the best of our knowledge and belief, no exchange was ever completed for the

above described lands, and since the powers of attorney to select and convey have been lost, the Santa Fe Pacific Railroad Company respectfully requests that a quitclaim deed covering the above described lands be issued to it by the United States of America as provided by the Act of April 28, 1930. (46 Stat. 257), so that title can be cleared and confirmed to the parties entitled thereto." C.R. 80.

Without waiting for expiration of the time fixed by the Recordation Act for unknown owners of selection rights to appear, the Department quitclaimed to Santa Fe in 1956 the base land which had been the consideration for the selection rights owned by Battle Mountain. C.R. 80. When Battle Mountain applied to select lands in Oregon, the Department ruled that these rights had been extinguished by the 1956 conveyance of the base land to Santa Fe. C.R.80, Appendix C, p. A32; C.R. 63, Appendix D, p A35.

Battle Mountain Company sought judicial review of this administrative action, contending that the conveyance of the base land to Santa Fe was not authorized by the 1930 Statute under which it purported to be made 9/ and was not effective to extinguish the obligation of the United States to honor the selection right owned by Battle Mountain. The Secretary argued that the selection right was not assignable, but was merely an exchange right personal to the landowner who relinquished land to the United States under the Act of June 4, 1897. The United States District Court for Oregon held

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9/ Act of April 28, 1930, (46 Stat. 257), Appendix E, p. A38.

that the lieu selection rights in question were assignable and that Battle Mountain Company was the real party in interest. It ordered the Secretary to treat plaintiff's lieu selection rights as valid. The District Court's opinion reprinted Appendix B, pp. A15-A28.

Defendant appealed to the United States Court of Appeals for the Ninth Circuit, which reversed the District Court and affirmed defendant's ruling that such rights are not assignable and as to Battle Mountain had been extinguished by the reconveyance of the base land to Santa Fe in 1956. The Ninth Circuit's opinion is reprinted Appendix A, pp. A1-A13.

Battle Mountain invoked jurisdiction of the United States District Court for Oregon under the substantive and procedural provisions of the due process clause of the Fifth Amendment to the Constitution of the United States and the following Acts of Congress: The Act of October 5, 1962, (76 Stat. 744, 28 U.S.C. Secs. 1361, 1391); the Act of June 25, 1948, Ch. 646, (62 Stat. 930, 28 U.S.C. Sec. 1331, as amended); the Act of June 25, 1948, as amended, (62 Stat. 964, 28 U.S.C. Secs. 2201, 2202); the Administrative Procedure Act of June 11, 1946, (60 Stat. 243, 5 U.S.C. Sec. 1009), and the inherent power of the Court to grant injunctive relief in the premises.

ARGUMENT

The decision of the Court of Appeals disturbs the foundations of titles to land and rights to land based on scrip and lieu selection rights where the statute does not specifically confer, nor prohibit, the right of assignment. Indeed, if the decision is upheld as a precedent, and selec-

tion rights are not transferable, then this departure in one fell swoop invalidates unsatisfied lieu selection rights owned by assignees, and puts in doubt their titles to land, and rights to land, acquired through transfers of those rights. The decision upholds the discretionary authority claimed by the Secretary of the Interior to terminate those constitutionally protected rights.

1. Santa Fe's selection rights, which it sold to Battle Mountain, are based upon a contract with the United States of America, which is constitutionally protected by the Fifth Amendment.

This Court has held in the Northern Pacific Railway Company Forest Reserve case that the right to select lieu lands is a substantial right and within the protection of the Due Process clause of the Constitution; and in reversing the Ninth Circuit, held in United States v. Northern Pacific Ry. Co., 256 U.S. 51 (1921) at P. 64 that "the proposal was converted into a contract, as to which the company by performing its part became entitled to performance by the Government. Burke v. Southern Pacific R. R. Co., 234 U.S. 669, 679,680 . . . and it is apparent from the granting act and resolution that "it was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits. Weyerhauser v. Hoyt, 219 U.S. 380, 387. Such rights are within the protection of the due process clause of the Constitution. Sinking Fund Cases, 99 U.S. 700, 718", and in United States v. Northern Pacific Ry. Co., 295 U.S. 317, (1940) at P. 346 that under the ruling in the Forest Reserve case it was the obligation of the Government to refrain from any action which would deprive the

company of its right of selection in accordance with the terms of the grant."

In Lynch v. United States, 292 U.S. 571, (1934), it was held at P 579 that "The Fifth Amendment commands that property be not taken without just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. United States v. Central Pacific R.R. Co., 118 U.S. 235, 238; United States v. Northern Pacific Ry. Co., 256 U.S. 51, 64, 67. When the United States enters into contract relations its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

2. The 1918 decision, C.R. 79, by the Secretary's predecessor in office, determined that the base lands were valid for a new selection right. The 1963 opinion of the Secretary, Appendix C, p. A-28, is an attempt to deprive Battle Mountain of its rights without "Due Process" of law. Mr. Justice Grier in United States v. Stone, 2 Wall 525, at page 535; said "One officer of the Land Office is not competent to cancel or annul the acts of his predecessor . . ." And in Noble v. Union River Logging R.R., 147 U.S. 165, at page 176, it was said; "A revocation of the approval of the Secretary of the Interior, however, by his successor in office was an attempt to deprive the plaintiff of its property without "Due Process" of law, and was, therefore void."

3. The Secretary's reliance upon Section 7 of the Taylor Grazing Act for discretionary power to terminate selection rights is misplaced. Power to classify lands suitable for satisfaction of

scrip obligations of the United States is authorized, but Section 1 of the Act provides; "Nothing in this chapter shall be construed in any way to diminish, restrict, or impair any right which has been heretofore, or may be hereafter, initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law..." 43 U.S.C. 315.

The only precedent pointed to by the Secretary for his assertion of discretionary authority to terminate Battle Mountain's selection rights is his own similar action in the case of Richard M. Lade, A-29121, which is presently under judicial review by the United States District Court for Oregon and is expected to be reversed.

4. The Director's 1956 deed to Santa Fe is void and being void did not convey the base lands to Santa Fe. Title remained in the United States. The Director exceeded his authority in each of the following particulars. He had no authority under the Act of April 28, 1930, Sec. 6, (46 Stat. 257): (a) to rescind the contract entered into between the Secretary and Santa Fe, approved and ratified by the 1905 Act; (b) to convey the land, C.R. 80, Appendix D, p. A34, to which the United States had both legal and equitable title; which it had accepted as consideration for the obligation of the United States to honor the selection right, which Santa Fe's letter warned the Director it had sold to a third party long previously; (d) to make conveyance on the non-statutory ground that the powers of attorney to select and to convey had been lost, C.R. 80, Appendix D, p. A34; (e) to make conveyance without first determining the party or parties entitled thereto; (f) to make such determination without Due Process, i.e., notice and hearing, C.R. 65, 66, Appendix C,pA31;

(g) to delegate to Santa Fe the power and the duty to determine the party or parties entitled thereto; (h) to extinguish a contractual obligation constitutionally protected.

In Burfenning v. Chicago St. Paul R.R. Co., 163 U.S. 321, it was held that a wholly unauthorized conveyance made in defiance of statute although culminating in a patent, transfers no title. At P. 323, "In other words, the action of the Land Department cannot override the express will of Congress or convey away public lands in disregard or defiance thereof. Smelting Co. v. Kemp, 104 U.S. 636, 646; Wright v. Roseberry, 121 U.S. 488, 517; Doylar v. Carr, 125 U.S. 618; See 139 U.S. 507, 529; 142 U.S. 161."

The Secretary did not hold that his 1956 deed to Santa Fe was valid. He did not pass on the validity of the deed. He maintained that if the deed to Santa Fe was made by mistake, the mistake was immaterial. C.R. 65, 66. He claimed discretionary power to terminate Battle Mountain's selection rights. But the Department's mistake is not binding on Battle Mountain, for that would violate the "rule well estalished in the land office that parties' rights are never prejudiced by errors of the land office". Frank F. McCain, 34 L.D. 126 (1905).

In Battle Mountain, legal and equitable title to the base land vested in the United States. Clearly an official representing the Government decided that the base was valid for a new selection right, C.R. 79, Appendix D, p A34. Thus our case here is distinguishable from Cosmos, relied upon by the Secretary, for in that case no officer representing the Government accepted the deed tendered in a proposed exchange of lands under the

1897 Act. Cosmos Co. v. Gray Eagle Co., 190 U.S. 301, 311.

The fact that the Government had acquired legal and equitable title to the base lands conveyed to it by Santa Fe under the contract with the Government is the reason why the Department recognized that these base lands constituted a class distinct and separate from base lands surrendered under the 1897 Act. Santa Fe Pacific R.R. Co. et al., 40 L.D. 360. The Government's ownership of the base lands, which had been accepted as the consideration, explains why a right to select lands in lieu of Santa Fe contract base lands would continue to be valid until it was satisfied, even though an attempt to exercise it should fail for the fault of the selector. Ibid. By contrast, a mere exchange right under the 1897 Act would cease to exist if a relinquisher's application for lieu selection failed through his own fault. W. W. Moses Land Scrip and Realty Company, 34 L.D. 458 (1906); George L. Ramsey by Ted E. Collins, 58 I.D. 272, at 288 (1942).

5. Battle Mountain's rights were not exchange rights, but perfected lieu selection rights, freely assignable, for they were the obligation of the United States to pay for lands to which it had acquired ownership.

The Secretary equates exchange rights under the 1897 Act, (30 Stat. 36), Appendix E, p. A35, with perfected Santa Fe selection rights. But the rights are not the same. An exchange under the 1897 Act was initiated by tender of the base land simultaneously with a selection of the lieu land. The land selection had to be made with the

tender and could not be held open as a floating right to be exercised in the future. But in Battle Mountain, the selector was granted, based on contract with the Government, a new selection right to select land in the future, C.R. 79, Appendix D, p. A34--a floating right until it was exercised. The former is an exchange right personal to the relinquisher to propose to exchange land, which does not ripen into an obligation of the United States until the moment approval of the lieu selection extinguishes it. The latter is a perfected lieu selection right, an obligation to pay for land which has been acquired by the Government. The rights are the same as scrip rights, freely assignable.

Prior to the ruling in Webster v. Luther, 163 U.S. 331, in 1886, the Land Office had ruled that selection rights under R.S. 2306, were essentially personal and non-assignable. After this decision, the Department ruled that the selection rights were not only assignable but inheritable. This view was adhered to until 1917 when the non-assignability of selection rights rule was reinstated by the Department, 46 L.D. 32, on the ground that the selection rights before acceptance were not property at all but mere unaccepted offers. Mr. Justice Sutherland, speaking for the Court, said in Anderson v. Clune, 296 U.S. 140, 143 (1925), that this ruling was made plainly in the face of Webster and rejected the administrative practice. Both Webster and Battle Mountain involve equally perfected rights to select in the future lands in the public domain.

No act of Congress prohibited Santa Fe from transferring its selection rights. The presumption is that Congress intended to make the selec-

tion rights as valuable as possible. To prohibit their sale would have rendered them nearly, if not quite, valueless. The general rule of law discourages restraints upon alienation. It was for reasons mentioned that the Court held in Webster that the selection rights were assignable.

Speaking for the Circuit Court, D. Colorado, Brewer J., later Mr. Justice Brewer, in Mullen v. Wine, 26 Fed. 206 (1886) said concerning the right to select land from the public domain that, "It was a mere right of selection and taking. Like all property, it was the subject of sale. The right to sell property need not in terms be granted; it exists if it is not in terms withheld."

In Barnes v. Poirier, 64 Fed. 14, 15, 19 (1894) the Court of Appeals for the Eighth Circuit said about selection rights and restraints on their transferability, at P. 15, "Restraints upon alienation are not favored by the law. The modern rule is that one may do what he will with his own, unless prohibited by positive statute, or restrained by a manifest public policy." And at P. 19, "In these Western states, land may almost be said to be an article of merchandise. It is bought and sold far more frequently than in the older states, and many tracts of these lands have been conveyed many times, and valuable improvements have been made upon them by the purchasers whose titles rest upon such assignments and powers. These early decisions have been repeatedly affirmed. Montgomery v. Land Bureau, 94 Cal. 284, 29 Pac. 640; Webster v. Luther, 50 Minn. 77, 54 N.W. 271; Montague v. McCarroll (Utah) 36 Pac. 50. This course of judicial decision ought not to be reversed. The title to the lands conveyed on the faith of it ought not to be disturbed..."

6. The rule affording great deference to administrative interpretation of statutes which the agency administers is not properly invoked unless the interpretation relied upon actually embraces the precise issue under consideration. Kings & Kern River Projects, M-36634, 61 I.D. (Dec. 26, 1961). Since the precise issue under consideration here is the validity of the Government's obligation to pay for lands it acquired, the Court of Appeals erred by applying here departmental construction of the Act of 1897, which relates only to cases10/ where the Government did not acquire any lands and had no obligation to pay for anything.

In the District Court, the Secretary moved to dismiss the complaints and for summary judgments in Battle Mountain, Linn Land and Schmand, 255 F. Supp 382, Appendix B, p. A14, heard together, on the grounds that the attorneys in fact were not the real parties in interest. The District Court

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10/ In all of the cases relied on by the Secretary and followed by the Court of Appeals for the proposition that the Government would refuse to recognize assignments and assignees of 1897 Act in lieu selection rights, the right discussed was merely an exchange right personal to the relinquisher. It was not an obligation of the United States, which had not accepted title to the base lands. George L. Ramsey by Ted E. Collins, 58 I.D. 272, 294-295 (1942); F. A. Hyde et al., 28 L. D. 284 (1899); John K. McCornack, 32 L.D. 578 (1904); Albert L. Bishop, et al., 33 L.D. 139 (1904); Hammond Lumber Co., 46 L.D. 479 (1918); Heirs of George Liebes, 33 L.D. 458 and 460 (1905); California Door Co., 52 L.D. 644 (1929).

held against the Secretary on this issue. It is significant that the Secretary followed the administrative practice, accepted the powers of attorney as assignments, and redeemed the obligations owned by Linn Land, Appendix H, pp A88-A90, and the obligations owned by Schmand, assigned through powers of attorney to Equity Funding, Appendix H, pp. A90-A92, making the payments directly to the attorneys in fact.

To show administrative practice where assignments of forest lieu selection rights have been recognized, we have placed in Appendix G, pp A59-A82, all of the forest lieu selection rights in unreported cases11/ recorded under the Recordation Act of 1955. This shows active cases where the rights have been transferred and the assignments recorded. By analogy, the lieu selection rights earned by the Northern Pacific Railway Company are the same as the rights earned by Santa Fe. These rights under the Act of July 1, 1898, (30 Stat. 597, 620) (Forest Reserve Cases) are listed in Appendix H, pp A83-A93. They show

11/ Although Departmental decisions may not be included in the volumes published as Decisions of the Department of the Interior, they may be cited as precedents in proceedings under the Administrative Procedure Act since they are available for public inspection pursuant to published Departmental regulations, which is in accordance with Section 3 of that Act. United States v. E. M. Johnson et al., A-30191 (Apr. 2, 1965).

similar administrative practice and unreported cases where assignments have been recognized and the rights have been paid in land or money.

7. Congressional interpretation of the transferability of selection rights it has created should be of help to the Court.

It was the intention of Congress and the Department to recognize and establish privity with the unknown transferees who then owned outstanding obligations of the United States to redeem land selection rights.

The letter of Orme Lewis, Assistant Secretary of the Interior, requesting Congress to enact the Recordation Act of 1955 pointed out: "This bill would enable the Department to ascertain all outstanding lieu selection or scrip rights, including bounty land warrants. An unknown amount of such rights and claims, which range from about a half to over a full century old, is in existence. ...Once the amounts of the various scrips and rights which remain to be satisfied are definitely determined, the Department will be able to formulate a procedure for satisfying them. It is evident that virtually all of these old rights are now held by heirs and assignees of the persons to whom they were granted." House Report 749 on H. R. 2972, 84th Cong. 1st Session.

A Senate amendment to the bill insisted that notices be published so that assignees holding these obligations of the Government would be informed of the necessity to record their ownership of the rights. Senate Report 880, 84th Cong. 1st Session.

Subsequent Congressional interpretation that selection rights are assignable is made clear by the Acts of July 6, 1960, (74 Stat. 334), Appendix E,p.A40, and of August 31, 1964, (78 Stat. 751, Appendix E, p A41. In these statutes, the United States unambiguously did commit itself to recognize assignees of forest lieu selection rights. Appendix 1, p A12.

CONCLUSION

Petitioner respectfully submits that this honorable Court should deem this case to be of sufficient importance to make appropriate the granting of a writ of certiorari.

Unless the decision of the Court of Appeals is corrected, the petitioner's constitutionally protected property rights will be destroyed through the Secretary's unauthorized assumption of discretionary power to extinguish the contractual obligation of the United States to pay for lands which it had received. Illegal administrative action, which conveyed away without statutory authority lands belonging to the United States, will be upheld and permitted to confiscate the petitioner's property rights, in violation of petitioner's rights under the Fifth Amendment.

Respectfully submitted,

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Counsel for the Petitioner

January, 1968

APPENDIX A

OPINION BELOW

No. 21,259 --October 18, 1967

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Stewart L. Udall, Secretary of the Interior, Appellant,	)	
vs.	)	No. 21,259
Battle Mountain Company, Appellee.	)	

On Appeal from the United States District Court for the District of Oregon

Before: JERTBERG and MERRILL, Circuit Judges, and TAYLOR, District Judge

MERRILL, Circuit Judge:

Battle Mountain Company initiated these proceedings to secure review of an administrative decision of the Secretary of the Interior rejecting the right of Battle Mountain to the selection of public lands in lieu of forest lands relinquished to the United States by Santa Fe Pacific Railroad Company in 1908. Battle Mountain claimed its forest lieu selection right through 1915 assignments from Santa Fe. The administrative decision rejecting its claim was pursuant to the position of the Secretary that such rights are not assignable and, as to Battle Mountain, had been extinguished by the Government's 1956 reconveyance to

Santa Fe of the forest lands theretofore relinquished.

On review of this decision the District Court reversed, holding that the rights asserted by Battle Mountain were valid and must be respected by the Secretary. Linn Land Co. v. Udall, 255 F. Supp. 382 (D.Ore. 1966). This appeal followed.

The sequence of events involves and spans various Public Lands Acts.

The Act of June 4, 1897, 30 Stat. 36.

In the late 1900's the creation of forest reserves was initiated, primarily from the public domain. Difficulties in consolidating reserves arose through the interference of prior land grants, particularly those to land grant railroads.

On June 4, 1897, Congress passed an act providing that where lands in private ownership or subject to bona fide claim lay within the limits of a forest reservation, the settler or owner might relinquish the tract to the government and select in lieu thereof a tract of vacant public land of equivalent area.

In 1898 the San Francisco Mountains Forest Reserve was established in what is now the State of Arizona. Prior land grants to the Atlantic and Pacific Railroad, predecessor of the Santa Fe, left only alternate sections available for the reserve. Since the checkerboard nature of the reserve presented administrative problems, negotiations were commenced by the Government to secure the railroad's relinquishment of its forest lands. On January 11, 1901, Santa Fe undertook, with the agreement of the Secretary, to surrender its title

to the odd-numbered sections in the forest reserve. Correspondence setting out the agreement was exchanged in March and April, 1902.

In 1905 Congress repealed the 1897 Act so far as it related to forest lieu selection rights (33 Stat. 1264), but a savings clause preserved contracts theretofore entered into by the Secretary. On November 28, 1908, the lands here involved were conveyed by Santa Fe to the United States.

In 1915, by two powers of attorney, Santa Fe authorized attorneys-in-fact to exercise its right to the selection of lieu lands. It is through these two instruments, to which it has succeeded, that Battle Mountain asserts its present claim.

The Act of September 22, 1922, 42 Stat. 1017.

Uncertainties arising where exchanges under the 1897 Act were incomplete or were defeated by the Act of 1905 created clouds on the title of original owners of lands relinquished to the United States. To remedy this situation Congress, in 1922, passed an act permitting the United States to quitclaim relinquished base lands back to the original owner. The act provided:

> "That where any person or persons in good faith relinquished to the United States lands in a national forest as a basis for a lieu selection. . . and failed to get their lieu selections of record prior to (repeal of the Act of June 4, 1897). . . or whose lieu selections, though duly filed, are finally rejected, the Secretary of the Interior. . . upon application of such person or persons, their heirs or assigns, is authorized to. . . relinquish and quitclaim to such person or

persons, their heirs or assigns, all title to such lands which the respective relinquishments of such person or persons may have vested in the United States."

This act by its terms lapsed in five years but was, to the extent relevant here, reinstated by the Act of April 28, 1930, 46 Stat. 257.

The Recording Act of 1955, 69 Stat. 534, 43 U.S.C. Sec. 274 Note.

The Act of 1897 was but one of many acts by which Congress had authorized the grant of rights to selection and claim of public lands. In most instances these rights did not result from exchange of lands desired by the Government, but were granted for the purpose of creating incentive for settlement or of compensating for military or other service to the country. Many of such rights, known as "scrip", were freely transferred.

In 1955, concerned about the extent of floating scrip and dormant land claims and desirous of knowing the extent of the Government's unfulfilled obligations respecting public lands, Congress passed an act requiring recordation of all such claims, including claims to forest lieu selection rights. It was provided that if such claims were not recorded within a two-year period they would not be accepted as a basis for the acquisition of land.

In 1956 Santa Fe, proceeding pursuant to the Act of 1922 as extended by the Act of 1930, requested reconveyance of the lands it had relinquished nearly 50 years earlier. No one had appeared with the 1915 powers of attorney to claim a lieu selection and Santa Fe believed, apparently in good faith, that the powers of attorney had been lost.

Acceding to this request the Government, in 1956, quitclaimed back to Santa Fe the base lands formerly relinquished to the United States.

The following year, within the period prescribed by the 1955 Act, Battle Mountain's predecessor in title recorded the 1915 powers of attorney. In 1961 Battle Mountain filed to exercise its lieu selection rights.

On July 28, 1961, the Case-Processing Section of the Bureau of Land Management rejected Battle Mountain's claim, and the rejection was upheld on appeal within the Department of the Interior. This suit followed.

The question of assignability.

The case presents the question whether the 1915 powers of attorney were transfers the Government was obligated to respect. If they were, then the Department had acted rashly and improvidently in quitclaiming the base lands back to Santa Fe. If they were not, then all lieu selection rights were effectively extinquished by the reconveyance of the base lands upon which those rights depended.

As we have noted, the Act of 1897 was but one of many acts by which Congress had authorized the granting of rights to selection and claim of public lands. In most of the acts the rights expressly were made either assignable or nonassignable. On this question the 1897 Act is silent.

The position of the Department from the outset has been made clear, however. Since the right of selection under the Act ran to "the settler or owner" of the relinquished base lands, the Government would deal only with him or a duly authorized

agent or attorney. In the eyes of the Department the rights did not constitute assignable scrip.

"Instructions Relevant to Forest-Reserve Lieu Lands Selection," 31 L.D. 372, issued in 1902, contains this provision:

> "19. A selection based upon land covered by a patent or patent certificate must be made by the owner of the land relinquished or by a duly authorized agent or attorney-in-fact; and when made by an agent or attorney-in-fact, proof of authority must be furnished."

To this effect were decisions of the Department in F. A. Hyde, et al., 28 L.D. 284 (1899); John K. McCornack, 32 L.D. 578 (1904); Albert L. Bishop, et al., 33 L.D. 139 (1904); Hammond Lumber Co., 46 L.D. 479 (1918).

Further it was early made clear that a power of attorney was to be regarded as precisely that, and that patents would issue only to the principal. The agent was not to be treated as an assignee. Heirs of George Liebes, 33 L.D. 458 and 460 (1905); California Door Co., 52 L.D. 644 (1929).

A clear expression of the departmental construction and a review of the decisions on which it rested are found in George L. Ramsey, by Ted E. Collins, 58 I.D. 272, 294-95(1942), where it was stated:

> ". . . From the beginning however dealers and speculators in public land rights have persisted in treating the exchange right as a scrip, a floating, assignable right, and have made persistent efforts to persuade the Department to this view. But the Department

> early decided that no floating right was intended by the Congress; that this law does not provide for the issuance of script in any form or for the certification of a right of selection; and that to speak of a 'scrip right' or 'scrip land' under this legislation is inaccurate and tends to confuse and mislead.
>
> Under the act the Department had no power to prevent assignment and scrip treatment of the exchange right by its owner. . . It could not require applicants to submit proof that they had not sold or assigned or contracted to sell or assign, directly or through irrevocable power of attorney, either their right to select or the selected lands themselves. But it could and did refuse to recognize assignments and assigness.
>
> The Department has therefore repeatedly held. . . that patent will not issue to an assignee but only to the owner of the base lands. Its position has been that if an owner who contemplates an exchange with the Government chooses to contract privately for the sale of his interest in selected lands in advance of their being patented to him, his transferee has no privity with the Government, will not be recognized by it and can make no demands upon it; and that no questions arising between the owner and his transferee upon such sale are any concern of the Government's."

We regard this as a reasonable construction of the Act. Since the relinquishment to the United States contemplated a completed exchange of lands an equity in the nature of a right to re-

scission remained with the owner of the relinquished land until the exchange had been completed and it was not until then that the United States might be regarded as vested with unconditional ownership. It was reasonable under these circumstances to regard the selection right as appurtenant to the owner's equity.1/

That deference is to be given to such administrative construction was made clear in Udall v. Tallman, 380 U.S. 1, 16 (1965), where the Supreme Court said:

> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reason-

1/Although we agree with the District Court that the Anti-Assignment Act, 31 U.S.C. Sec. 203, does not bar Battle Mountain's claim, the rationale behind that Act, as set forth in United States v. Shannon, 342 U.S. 288, 291 (1952), is analogous to that which lies behind the Interior Department's longstanding interpretation of what the 1897 Act requires. The United States should not be required to investigate alleged assignments and determine the rights of several parties inter se, but rather should be able to deal with the original transferee of base lands or holder of a money claim, and let other claimants sue him on their assignments. So it is in this case. Nothing we say here reflects on the right of Battle Mountain to sue Santa Fe on the powers of attorney it executed in 1915.

> able one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' Unemployment Comm'n v. Aragon, 329 U.S. 143, 153. See also, e.g., Gray v. Powell, 314 U.S. 402; Universal Battery Co. v. United States, 281 U.S. 580, 583. 'Particularly, is this respect due when the administrative practice at state "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."' Power Reactor Co. v. Electricians, 367 U.S. 396, 408."

This policy was recently followed by our court in Assiniboine & Sioux Tribes v. Nordwick, 378 F.2d 426 (1967). We there stated, in discussing the choice between conflicting constructions of an ambiguous statute:

> "The consideration we find compelling. . . in this case is the virtually unbroken administrative practice (of the Department of the Interior) of issuing patents on pre-1927 homestead applications after passage of the 1927 Act without reserving oil and gas rights. This practice seemingly reflects a uniform contemporaneous interpretation of the 1927 Act by persons presumably familiar with its background and purpose, and we are persuaded by it." Id. at 432.

Appellant regards this clear administrative construction as nullified by an instance in which the holder of a power of attorney had been recognized by the Department as having a selection right and had been granted patent. There, in a

dispute between the patentee and the owner of the base lands, the title of the patentee was upheld. Begue v. Grizzly Livestock and Land Co., 1 F.Supp. 229 (S.D.Cal. 1932). The court did not reach the question before us. It simply dealt with rights as between the parties and refused to review the administrative decision that the patentee was entitled to recognition by the Government.

It is ironic but understandable that the single instance in which an exercise of administrative judgment under the Act has reached the courts should be one completely lacking in persuasion as to authoritative administrative construction. In Begue, the action of an inferior agent of the Department, being such as to avoid grievance, never reached the level of administrative appeal at which authoritative departmental determinations on behalf of the Secretary are made. We cannot permit the judgment of an inferior official to set at naught the otherwise clear departmental construction.

Nor do we think it of any consequence that the Interior Department, in its interdepartmental memoranda and bulletins, has itself referred to these lieu selection rights as "scrip", a term that should be reserved for a floating right issued in exchange for land. As noted in the quotation from George L. Ramsey, by Ted E. Collins, supra, the department recognizes the inappropriateness of the word in this context.

Battle Mountain directs us to Webster v. Luther, 163 U.S. 331 (1896), where the Supreme Court ruled in favor of assignability in interpreting another statute, similarly silent on the question, that authorized issuance of land selection rights. In that case, however, the Court found that despite contrary Land Department practice the

"obvious purpose" of the 1872 Act conferring soldier's additional homestead rights was to allow free alienation of those rights. There is no such obvious purpose in the act before us, and the Webster Court itself emphasized the respect due administrative construction in doubtful cases. 163 U.S. at 342.

Battle Mountain further contends that subsequent legislation has established the assignability of these rights, negating any inference to the contrary from administrative practice. Its principal reliance is upon the 1922 Act and its use of "heirs and assigns" in describing those entitled to reconveyance.

The Department, in construing this language, assumed that "assigns" in the context in which it was used referred to transferees of title to the base lands rather than to transferees of the lieu rights. Collins Land Co., 51 L.D. 190 (1925); B. F. Felton, 52 L.D. 484 (1928); California Door Co., 52 L.D. 644 (1929).

This, in our judgment, is a wholly reasonable construction to which we should defer. It is consistent with the position of the Department under the Act of 1897 "Heirs and assigns" are fee simple words of art and their use, apparently in that manner, cannot be said unambiguously to have a different and broader construction. The Act of 1897, as we have noted, contemplated a completed exchange. If an unfinished exchange were to be undone it is not unreasonable to require that the base lands return to the one who can claim equitable ownership.

Battle Mountain also placed reliance upon the Recording Act of 1955. That Act, however, did not

purport to commit the United States to recognize assignments not theretofore binding. Had the Act applied only to lieu rights and to rights expressly made enforceable against the Government there might be room for the view that Congress, in 1955, regarded lieu rights as assignable along with all the rest. The Act, however, covered rights expressly made nonassignable,2/ thus including claimants whose claims the Government was not bound to respect. It would seem, then, that Congress's principal purpose was to secure information. In the absence of clear expression we cannot conclude that it intended, on the basis of information yet to be disclosed, to obligate itself in any fashion beyond its already existing commitments.

There can be little doubt that the Interior Department acted unwisely and perhaps contrary to the spirit of the 1955 Act in dealing with Santa Fe without waiting out the recording period. However, this was an administrative judgment which it is not our function to review.

Battle Mountain also calls our attention to the Acts of July 6, 1960, Pub.L. No. 85-596, 74 Stat. 334, and of August 21, 1964, 43 U.S.C. 274 Note. Here the United States unambiguously did commit itself to recognize assignees of forest lieu selection rights. The acts came too late to be of direct aid to Battle Mountain but are cited to us as demonstrating Congressional construction of its obligations under the Act of 1897. We do not regard them as having that effect.

2/ E.g., Sioux Half-Breed scrip, issued under the Act of July 17, 1854, 10 Stat. 304, the second type of selection right mentioned in the Act.

Legislative history shows clearly what Congress had in mind in 1960. It was concerned over the fact that public lands of the United States were being reconveyed under the 1930 Act (the successor of the 1922 Act) in "what the public press, conservation interests and others regard as being virtually a 'give-away' of public resources approaching a scandal." S.Rep. No. 1639, 86th Cong., 2d Sess. (1960). The 1960 Act repealed the provision permitting reconveyance. Instead, claimants were to be compensated at $1.25 an acre. (The 1954 Act provides compensation on a different basis as an alternative to selection of lands and includes all who had recorded under the 1955 Act). Further the legislative history shows that the extent of recordation under the 1955 Act was carefully analyzed in order that the cost of such compensation might be anticipated.

Congress, then, was in 1960 retiring unexercised lieu selection rights for money. It was not dealing with public land. On a money basis, where land transfer was not involved and where the cost was predictable, it was willing to accept the consequences of recognizing the validity of assignments. We do not find in this manner of closing the book on forest lieu slection rights and meeting its outstanding land obligations anything inconsistent with the prior departmental construction of the Act of 1897.

We conclude that the departmental construction of the Act of 1897 is entitled to judicial recognition.

Judgment is reversed. The decision of the Secretary on the departmental appeal of Battle Mountain is reinstated.

APPENDIX B

OPINION BELOW

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

LINN LAND COMPANY, an Oregon corporation, Attorney in Fact for Mike Swab, Gustave Borowski and Peter Horish, Plaintiff, v. STEWART L. UDALL, Secretary of the Interior, Defendant.	CIVIL NO. 63-264
CARL E. FORSBERG, Plaintiff, v. THE HONORABLE STEWART L. UDALL, Secretary of the Interior of the United States, Defendant.	CIVIL NO. 63-472
CASPER JOSEPH SCHMAND, Plaintiff, v. THE HONORABLE STEWART L. UDALL, Secretary of the Interior of the United States, Defendant.	CIVIL NO. 63-484
PROPERTY MANAGEMENT COMPANY, an Oregon corporation, Plaintiff, v.	CIVIL NO. 64-28

THE HONORABLE STEWART L. UDALL, Secretary of the Interior of the United States, Defendant.	)	
BATTLE MOUNTAIN COMPANY, a Wyoming corporation, Plaintiff,	)	CIVIL NO. 64-29
v.	)	
THE HONORABLE STEWART L. UDALL, Secretary of the Interior of the United States, Defendant.	)	OPINION

KILKENNY, DISTRICT JUDGE:

Each plaintiff, on this review of a decision of the Secretary, seeks a judgment requiring the defendant Secretary to issue patents to parcels of land selected by each plaintiff in satisfaction of certain scrip rights, obligations of the United States to pay, in land, for other land which it received. The rights, if any, of the plaintiffs and the obligations, if any, of defendant in his official capacity arise out of the Acts of Congress of June 4, 1897 (30 Stat. 36), of July 1, 1898 (30 Stat. 620), and amendments of June 6, 1900 (31 Stat. 614), amendment of February 27, 1917 (39 Stat. 946), and the savings clause of the Act of March 3, 1905 (33 Stat. 1264). The Valentine scrip issued pursuant to Act of Congress of April 5, 1872 (17 Stat. 649), the McKee Certificate, pursuant to Act of Congress of January 25, 1853 (10 Stat. 745), as amended March 1, 1889 (25 Stat. 1307).

Being of the belief that the same general principles of law apply in each one of the cases,

although different statutes and somewhat different issues are involved, I shall discuss each issue as though raised in all cases. I believe my conclusions on those issues will be dispositive of all of the principal issues presented.

In general, the legislation gave the Government the right to give to those conveying lands to the Government, a right to select Government lands, in lieu of the lands so conveyed to the Government. In the Battle Mountain case, the Santa Fe Railroad exercised its rights, under the legislation, and in 1908 conveyed certain lands to the Government for the in lieu selection rights here in question. These rights were transferred by the Santa Fe to plaintiff's predecessors in interest. In turn, the predecessors transferred these rights to the plaintiff, who attempted to exercise the rights in 1961, and the Department of the Interior challenged the right of assignment by the Santa Fe. In the Linn Land and other cases, the Secretary claimed that he had classified the lands pursuant to the provisions of the Taylor Grazing Act (43 U.S.C. Sec. 315 (f)) and that under such classification the particular land selected was not subject to a scrip right.

In Linn Land, the Secretary classified the lands as well suited for public recreational use. Some quibble is made as to whether a separate determination was made as to each of the six parcels selected.

In Fosberg, the Secretary classified the lands as more valuable and suitable under the sustained yield forest management program of the Bureau of Land Management.

In Schmand, the Secretary found that the lands

were a vital and integral part of a sustained yield forest management program of the Bureau of Land Management.

In Property Management Company, the Secretary classified the tract as vital and an integral part of the sustained yield forest management program of the Bureau of Land Management.

Prior to the passage of the Taylor Grazing Act in 1936, as amended in 1937, there was no limitation on the type of land to be selected under scrip, as long as it was vacant and non-mineral. By an Executive Order on November 26, 1934, the President of the United States withdrew all unreserved and unappropriated Western lands from selection. As part of a general plan to protect the Government's lands, the Taylor Grazing Act was enacted and under this Act the Secretary, in his discretion, was given the power to examine and classify lands as to whether they were more valuable for grazing, production of crop, any other use, or to be exchanged for selection rights as here involved. Here, the Secretary classified the lands as "more valuable or suitable for any other purpose than provided for in this chapter." Namely, that they were more valuable and suitable under the Bureau of Land Management's sustained yield program for forest timber, and should not be classified as eligible for in lieu selection rights.

Plaintiffs claim that this Court has jurisdiction under the following statutes:

(1) 28 U.S.C. Secs. 1361, 1391.
(2) 28 U.S.C. Secs. 2201, 2202, and
(3) 5 U.S.C. Sec. 1009, the Review Section of the Administrative Procedure Act.

It is my considered judgment that the jurisdictional claims, with the exception of the review procedure of the Administrative Procedure Act, are completely unsound. The United States of America would be an indispensable party on those claims. If plaintiffs are permitted to invoke the jurisdiction of the Court under the indicated statutes, other than the review procedure, they would entirely circumvent the intentions of the Congress in enacting the Taylor Grazing Act and the Administrative Procedures Act.

Consequently, I shall treat each of the cases as being before me on review from the decision of the Secretary of the Interior. Those issues presented by the respective pre-trial orders, which are not on review, will not be considered in this Court.

I.

IS THE DECISION OF THE SECRETARY THAT LANDS CHOSEN BY THE PLAINTIFFS ARE NOT TO BE CLASSIFIED FOR DISPOSAL, SUBJECT TO JUSICIAL REVIEW?

The Government urges that the Secretary's discretionary determination under Sec. 7 of the Taylor Grazing Act (43 U.S.C. Sec. 315 (f)), that the land selected by the individual plaintiffs for their in lieu rights are not to be classified for disposal, is committed to agency discretion and is not reviewable in the light of Sec. 10 (2) of the Administrative Procedure Act (5 U.S.C. Sec. 1009 (2)). Consequently, says the Secretary, the action should be dismissed for want of jurisdiction. The Executive Order, carrying into effect the provisions of the Taylor Grazing Act, was promulgated on November 26, 1934. This Act temporarily withdrew from settlement, location, sale or entry, all vacant, unreserved and unappropriated public

lands in certain states, including the State of Oregon, where the subject lands are located. The lands were withdrawn pending the determination of the most useful purpose to which said land might be put in consideration of the provisions of the Taylor Grazing Act, having in mind the conservation and development of all natural resources of the nation.

I have grave doubts as to a court's jurisdiction to review the power of the Secretary to classify the lands pursuant to the legislation and the Executive Order. The decisions in Ferry v. Udall, 336 F.2d 706 (9th Cir. 1964), and Wyoming v. United States, 255 U.S. 489, 41 S.Ct. 393, 65 L.Ed. 742 (1921), cited by plaintiffs, construing other legislation and different facts, are not controlling. For that matter, the Ferry decision favors the Government's position, rather than that of the plaintiffs. I am inclined to hold that in the present case the Secretary was under a positive mandate to act, rather than a permissive right to act. Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 78 S.Ct. 752, 2 L.Ed.2d 788 (1958) draws this distinction, as does Schilling v. Rogers, 363 U.S. 666, 80 S.CT. 1288, 4 L.Ed.2d 1478 (1960), and United States v. Wiley's Cove Ranch, 295 F.2d 436 (8th Cir. 1961).

Although those are my views on this subject, the likelihood of an appeal dictates that I record my views on the other subjects properly raised on this review.

II.

ASSIGNABILITY OF SANTA FE RAILROAD SELECTION RIGHTS.

Here, the Battle Mountain selection rights

acquired through the Santa Fe Railroad, are to be distinguished from the other rights.

Battle Mountain's rights arose under the Act of June 4, 1897 (30 Stat. 36), which, in pertinent part, provided:

> "That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; . . ." (Emphasis supplied.)

That particular Act was repealed on March 3, 1905, (33 Stat. 1264), but the rights granted to the Santa Fe Railroad were saved. The Government urges that the rights acquired by Santa Fe were purely personal and that nothing in the Act contemplated the assignability of those rights. The Act itself refers to "owner or settler". The Government argues that the right of the railroad was terminated by the reconveyance by the Government of lands earlier relinquished by the railroad. On October 12, 1956, pursuant to 43 U.S.C. Sec. 872, when the land was conveyed to Santa Fe, it executed a release of any rights it had under the in lieu selection rights. Krug v. Santa Fe Pacific R.R. Co., 329 U.S. 591, 67 S.Ct. 540, 91 L.Ed. 527 (1947). It must be conceded that the Government, in the past, has allowed what amounted to an assignment, Begue v. Grizzly Live Stock & Land Co., 1 F.Supp. 229 (S.D. Cal. 1932), and that later legislation on the same subject (42 Stat. 1017) recognizes the rights of persons holding selection rights and

"heirs and assigns". True enough, this legislation was not passed until approximately twenty-five years after the rights were granted under the legislation in 1897. But it does show a practical interpretation as placed on the legislation by the Congress. I find that the selection rights in question were assignable.

III.

REAL PARTY IN INTEREST.

The Government's contention that the Santa Fe Railroad, rather than Battle Mountain, is the real party in interest, is without merit. Battle Mountain's reliance on Krug v. Santa Fe Pacific R.R. CO., supra, is entirely misplaced. The Secretary has long recognized the rights of those who held powers of attorney, coupled with an interest. Some of these are involved in the Linn Land Company case. The Commissioner recognized the "power of attorney" in Begue.

IV.

ANTI-ASSIGNMENT ACT. (31 U.S.C. Sec. 203.)

It is my opinion that the "claim" mentioned in this statute is concerned with the right to demand money from the United States; and has no application whatsoever with the legislation here under scrutiny. Typical of the cases cited by the Government is United States v. Dow, 357 U.S. 17, 78 S.Ct. 1039, 2 L.Ed. 2d 1109 (1958). It treats of the assignment of a common compensation claim against the Government, and has nothing to do with a right such as we have before us.

V.

DID THE SECRETARY EXCEED HIS STATUTORY AUTHORITY, OR VIOLATE THE FIFTH AMENDMENT, WHEN HE REJECTED THE PLAINTIFFS' APPLICATIONS?

Plaintiffs argue that the Congress never intended the Taylor Grazing Act to affect scrip rights and that the Act was only applicable to those lands suitable for grazing. Attention is drawn to the legislative history of the Act. 1/ And Executive Order 6910, withdrawing the public lands in the western states from settlement, location, sale or entry was made pursuant to what is commonly known as the Withdrawal Act of 1910. (36 Stat. 847). Plaintiffs urge that the Executive Order, as applied to their scrip rights; would be invalid and cite the case of United States v. Northern Pac. Ry. Co., 256 U.S. 51, 41 S.Ct. 439, 65 L.Ed. 825 (1921) and 311 U.S. 317, 61 S.Ct. 264. 85 L.Ed. 210 (1940), in support. Likewise, plaintiffs contend that Sec. 7 of the Taylor Grazing Act would be invalid if applied to the scrip rights under the doctrines taught in the Northern Pac. Ry. cases, supra. I do not read into the Northern Pacific cases, nor the legislative history of the Act, the teachings which plaintiffs find so apparent. These cases lay down the rule that there must be some land which is subject to selection rights. Nor do I believe that the Secretary's interpretation of the powers conveyed under Sec. 7 and the Executive Order, constitute an improper or unconstitutional delegation of congressional powers to an administrative official within the doctrines stated in Pahama Refining Co. v. Ryan, 293 U.S. 388, 420, 55 S.Ct. 241, 79 L.Ed. 446 (1935) and Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935). In

1/ Act of June 28, 1934 (48 Stat. 1272)

passing, I might add that the value of these cases in passing on my problems, has been questioned and seriously modified by later United States Supreme Court decisions. Davis, in his work on Administrative Law, Volume I, Secs. 2.01-2.16, is of the belief that neither Panama or Schechter would be followed today on the same facts.

Carl v. Udall, 114 U.S. App. D.C. 33, 309 F. 2d 653 (1962) seems to be the only case which discusses the congressional intent when passing the Taylor Grazing Act. There, the discussion is quite limited and, of little value. However, the decision in that case construing the language "any other use," as set forth in Sec. 7 of the Act, as containing a separate and distinct category which may include lands otherwise proper for scrip selection, seems to me to be sound. The record would here indicate that there are sufficient non-classified lands so that there would not be a "lasting and critical deficiency." Carl v. Udall, supra. In analyzing the Northern Pacific cases, on which plaintiffs rely, we must keep in mind that the plaintiffs here, as distinguished from the claimants in those cases, are not limited to a specified area from which land can be selected. Neither is LaRue v. Udall, 116 U.S. App. D.C. 396, 324 F.2d 428 (1963) of help to the plaintiffs. That case involved a determination that certain lands on which the plaintiff had grazing rights should be reclassified so that it could be used for national defense purposes. Again, the language of the majority opinion is more favorable to the position of the Government, than it is to that taken by the plaintiffs. It seems to me that Carl v. Udall, supra, is precisely in point on this issue and the related issues of due process and the impairment of an obligation of a contract.

It is my view that Sec. 7 does not contain an unlawful, unjust or unreasonable delegation of powers to the Secretary. While no case has been cited, nor found, which is exactly in point, the teachings of Tagg Bros. & Moorehead v. United States, 280 U.S. 420, 50 S.Ct. 220, 74 L.Ed. 524 (1930); New York Central Securities Corp. v. United States, 287 U.S. 12, 53 S.Ct. 45, 77 L.Ed. 138 (1932), are worthy of analysis and support the Secretary's position. Of course, these standards must not be viewed in isolation. They gain their vitality from the background and purposes of the entire Act. Certainly, the Constitution does not require Congress to foresee the countless situations to which it may wish a particular policy to be applied and to formulate specific rules for each problem as it arises. American Power & Light Co. v. S.E.C., 329 U.S. 90, 104, 67 S.Ct. 133, 91 L.Ed. 103 (1946).

The argument that Sec. 7 violates the Fifth Amendment's due process provision, in that it impairs the obligation of a contract fails to recognize that this provision applies only to the states. However, it has been used to set Fifth Amendment standards in connection with the taking of property without due process of law. John McShain, Inc. v. District of Columbia, 92 U.S.App. D.C. 358, 205 F.2d 882, 883-884 (1953), cert. den. 346 U.S. 900, 74 S.Ct. 227, 98 L.Ed. 400 (1953). The entire thrust of plaintiffs' "due process" argument fails when viewed in the light of the power of the Congress and the Secretary under Article IV, Sec. 3 of the Constitution, which authorizes the Congress to dispose of and regulate lands belonging to the United States. Of course, all sections of the Constitution must be construed together. Where the alleged injuries from the "taking" are indirect and consequential and result

from the exercise of a lawful power, such as the Congress acting Under Article IV, Sec. 3, supra, the Fifth Amendment provision has no application. Veix v. Sixth Ward Building & Loan Ass'n., 310 U.S. 32, 60S.Ct. 792, 84 L.Ed. 1061 (1940); In re Community Power & Light Co., 33 F.Supp. 901 (S.D. N.Y. 1940), legal tender cases Knox v. Lee, 12 Wall. 457,551, 79 U.S. 457, 551, 20 L.Ed. 287 (1870). Although these cases do not involve a state of facts similar to ours, it is logical to apply the doctrines stated in those cases to a land classification as mentioned in Sec. 7. Certainly, the Secretary was acting pursuant to a power enumerated in the Constitution and properly delegated to him.

VI.

CLASSIFICATION IN LINN LAND CASE.

It is urged that the lands involved in the Linn Land case had actually been classified for disposal. The record discloses that the lands had been withdrawn and reserved for federal power purposes on November 29, 1956, by order of the Department of the Interior 2/ and then restored.

2/ "The lands hereinafter described, so far as they are withdrawn and reserved for power purposes in Power Site Reserve No. 664 of December 12, 1917, are hereby restored to disposition under the public land laws, subject to the provisions of section 24, of the Federal Power Act of Jun 10, 1920 (41 Stat. 1075; 16 U.S.C. Sec. 818, as amended.)

* * * *

"No application will be allowed under the homestead desert land, small tract, or other nonmineral public land laws, unless the lands have already been classified as valuable or suitable for such type of application or shall be so classified upon consideration of an application. Any application that is filed will be considered on its merits.

Clearly, the restoration does not classify the lands or in any way affect the Secretary's right of disposal or classification under the Taylor Grazing Act.

VII.

ESTOPPEL.

The claims that certain agents of the Bureau of Land Management made certain representations to the plaintiffs, on which they relied, and that the Secretary should be estopped from denying the applications is worthy of little comment. It is well settled that an officer, or even an agency, of the United States, to whom no administrative authority has been delegated, cannot estop the United States even by an affirmative undertaking to waive or surrender a public right. State of Utah v. United States, 284 U.S. 534, 545-546, 52 S.Ct. 232, 76 L.Ed. 469 (1932); Wilber Nat'l Bank v. United States, 294 U.S. 120, 123-124, 55 S.Ct. 362, 79 L.Ed. 798 (1935); United States v. Stewart, 311 U.S. 60, 70, 61 S.Ct. 102, 85 L.Ed. 40 (1940).

VIII.

CONCLUSIONS.

Summarizing, even if the action of the Secretary in classifying the lands, as he did, under the Taylor Grazing Act, was reviewable, I would, and do hold that his expertise in the field of classification was such that it should not be disturbed by

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2/ (cont'd) The lands will not be subject to occupancy or disposition until they have been classfied."

the courts, and that his action was not arbitrary, capricious nor abusive discretion, nor otherwise not in accordance with law, nor was his action in excess of statutory jurisdiction, authority or limitations nor short of statutory right. Furthermore, I hold that the Secretary observed the procedures required by law and that his decision was supported by substantial evidence.

Only those questions which have been properly presented to the Secretary should be reviewed in this Court. Federal Power Comm'n. v. Colorado Interstate Gas Co., 348 U.S. 492, 75 S.Ct. 467, 99 L.Ed. 583 (1955); Unemployment Compensation Comm'n.of the Territory of Alaska v. Aragon, 329 U.S. 143, 67 S.Ct. 245, 91 L.Ed. 136 (1946). The Court can even refuse to hear constitutional questions which were not presented to the administrative agency. Pacific Gas & Elec. Co. v. S.E.C., 139 F.2d 298 (9th Cir. 1943), aff'd. 324 U.S. 826, 65 S.Ct. 855, 89 L.Ed. 1394 (1945), rehearing denied 324 U.S. 890, 65 S.Ct. 1010, 89 L.Ed. 1437 (1945); DeGorter v. Federal Trade Comm'n., 244 F. 2d 270 (9th Cir. 1957); California Interstate Telephone Co. v. F.C.C., 117 U.S.App.D.C. 255, 328 F.2d 556 (1964).

If plaintiffs' claim that some of the issues were not properly presented to the Secretary, they have a right, on remand, to ask the Secretary to re-open the cause for the purpose of passing on those issues.

Defendant's motion, in each case, for a judgment affirming the action of the Secretary is allowed. Proper judgments of affirmance shall be entered, with the exception of Battle Mountain. In that case, the Secretary did not reach a point for the use of his discretion. He held, as a mat-

ter of law, that the assignment by the Santa Fe to Battle Mountain's predecessors was non-assignable and, therefore, void. Earlier in this opinion, I expressed a view completely opposite to that of the Secretary and held that the scrip rights were assignable. Therefore, the decision of the Secretary in Battle Mountain must be set aside. °In this case we are not concerned with the Secretary's powers under the Taylor Grazing Act. On remand, the Secretary shall recognize the scrip now owned by this claimant and duly pass on its claim that the lands in question be classified as eligible for in lieu selection rights.

The Government's rights, if any, against Santa Fe are not here in issue.

DATED this 16th day of March, 1966.

John F. Kilkenny
District Judge

APPENDIX C

DECISION BELOW

No. A-29146--January 31, 1963

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D.C.

Battle Mountain Company, as Attorney in Fact for Santa Fe Pacific Railroad Company	: Oregon 011230 : Forest lieu selec- : tion application : rejected : Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Battle Mountain Company has appealed to the Secretary of the Interior from a decision of the Acting Chief, Case Processing Section, Bureau of Land Management, dated July 28, 1961, rejecting its application, filed as attorney in fact for the Santa Fe Pacific Railroad Company, on January 12, 1961, to select certain land in Oregon in lieu of the N-1/2SE-1/4, S-1/2NW-1/4 sec. 35, T. 19 N., R. 5 E., G.& S.R.M., Arizona, relinquished by the railroad company to the United States pursuant to the act of June 4, 1897 (30 Stat. 36), as amended by the act of June 6, 1900 (31 Stat. 614).

These acts provided for selection rights to public land by a settler or owner of an unperfected bona fide claim or patent to a tract of land included within the limits of a public forest reserve upon his relinquishing his claim or title to the tract to the United States. As indicated in the decision appealed from, although the 1897 and 1900 acts were repealed by the act of March 3, 1905 (33 Stat. 1264), this particular case came within two exceptions provided in the 1905 act for continuing recognition of selection rights under the earlier acts.

In rejecting the appellant's application, the Bureau indicated that the lands in Arizona claimed as base lands for the selection right had been reconveyed to the Santa Fe Pacific Railroad Company by a quitclaim deed executed by the Director of the Bureau of Land Management on October 12, 1956, pursuant to section 6 of the act of April 28, 1930 (43 U.S.C., 1958 ed., sec. 872), and concluded that a selection right based on such lands no longer existed.

Appellant contends that the United States has a legal and an equitable obligation to honor its selection. In making this contention, appellant equates forest lieu selection rights under the acts mentioned above with scrip rights which are transferable. It contends that the Director knew that the right had been transferred by the Santa Fe Railroad Company and that he had no authority under the 1930 act to reconvey the land to that company as it was not the party entitled to it, as required by that act. Appellant contends further that it was not a party to the reconveyance which was made fraudulently or by mistake and the contract rights it acquired by the "scrip" could not be destroyed by such action.

The documents upon which appellant bases its alleged contract rights against the United States are two power of attorneys executed by the Santa Fe Pacific Railroad Company, one in blank and the other to a named individual, authorizing the selection of lands for the railroad company as to the lands which it relinquished to the United States. With his application appellant also furnished copies of the deeds of relinquishment and also statements by the Bureau of Land Management that the powers of attorney had been recorded in the office of Director on August 7, 1957, and a subsequent recording of the same documents on February 18, 1959, pursuant to the act of August 5, 1955 (43 U.S.C., 1958 ed., sec. 274 note). Those statements indicated that the recordation of the documents does not certify as to their validity.

The appellant is not accurate in equating rights under the forest lieu selection acts with scrip rights. This Department has consistently held that the forest lieu selection rights are not scrip rights which may be assigned. See George L.

Ramsey, by Ted E. Collins, 58 I.D. 272 (1942), and cases cited therein. Rather, the selection right is a personal right of exchange by the owner of the base lands and the Government, and patent to any selected lands or reconveyance of the relinquished base lands must be made to the owner. Richard M. Lade, as Attorney in Fact for Santa Fe Pacific Railroad Company, A-29121 (January 10, 1963). So far as the Government is concerned, it is dealing with the owner of the base lands through his agent, if the choice of lands to be selected is exercised in behalf of the owner by a duly authorized agent or attorney in fact. Thus, any question of rights by those claiming to be agents or transferees from the owner is a matter between them only and any purported agent or transferee has no resort to the Government. Id.

Since appellant has no privity of contract with the Government with respect to the alleged selection right, any recourse must be sought elsewhere. Clearly, if any deed based on the selection right were to be issued, it had to be issued to the railroad company; therefore, appellant gains no rights by attacking the validity of the deed reconveying the relinquished land to the company.1/

1/This decision does not purport to make a ruling on the propriety of the conveyance of the land to the Santa Fe Pacific Railroad Company. The question arises, but need not be answered here, as to whether or not any selection right existed before the deed was executed and whether or not the railroad company was entitled to the reconveyance in view of releases executed by it of certain rights to railroad grant lands and indemnity rights stemming from such grants pursuant to section 321 of the Transportation Act of 1940 (43 U.S.C., 1958 ed. sec. 65). See Atlantic & Pacific R. Co., Santa Fe

Once the land to be used as the basis for exchange was reconveyed by the United States to the owner before any selection had been made, the consideration for the agreement of exchange between the United States and the owner failed and the right to select based on that agreement was extinguished. Id. As the Santa Fe Pacific Railroad Company no longer has any selection rights based upon the land which was reconveyed to it, the appellant, who could only be recognized as an agent for that company, has no greater rights than its principal. Id.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F. R. 1348), the decision appealed from is affirmed.

/s/ Ernest F. Hom

Ernest F. Hom
Assistant Solicitor
Land Appeals

1/ Continued. Pacific R. Co., & Greene Cattle Company, Inc., 58 I.D. 577 (1944); Krug v. Santa Fe Pacific R. Co., 329 U.S. 591 (1947). The resolution of this question could in no way help the appellant's position before this Department. Regardless of whether the deed was properly issued, or was issued under some mistake as to law or fact, the land claimed as base land is no longer under the jurisdiction of this Department, and under the criteria set forth in Everett Elvin Tibbets, 61 I.D. 397 (1954), there appears to be no reason for this Department to recommend to the Department of Justice that judicial proceedings be instituted to attempt to cancel the patent.

APPENDIX D

DECISION BELOW

No. Oregon 011230--July 28, 1961

Santa Fe Pacific Railroad Company, by Battle Mountain Company, Attorney in Fact	: Application to Selection, Act of June 4, 1897

Application Rejected

On January 12, 1961, the Santa Fe Pacific Railroad Company, by Battle Mountain Company, attorney in fact, filed application Oregon 011230 to select certain land in Oregon in lieu of the N-1/2SE-1/4, S-1/2NW-1/4 sec. 35, T. 19 N., R. 5 E., G. & S.R.M., Arizona, under the act of June 4, 1897 (30 Stat. 36), as amended by the act of June 6, 1900 (31 Stat. 614).

The act of March 3, 1905 (33 Stat. 1264), repealed the 1897 and 1900 acts, but confirmed contracts which theretofore had been entered into by the Secretary of the Interior. The repealing act of 1905 also excepted from its operation valid selections then pending.

The records of this office show that a valid application to select was then pending, filed by W. H. Oliver, attorney in fact, for the Santa Fe Pacific Railroad Company, tendering the above described land as basis for this selection. This selection application was canceled on June 9, 1911, for failure to comply with the requirements of office letter of December 3, 1910.

By letter of June 15, 1918, the abstracts of title and other papers relating to the selection

right were returned to the attorneys for the Railroad Company. The letter of June 15, 1918, stated in pertinent part, "The base is valid for the purpose of a new selection by virtue of the contracts entered into by the Santa Fe Pacific Railroad Company with the Secretary of the Interior, the validity of which was recognized by the saving clause of the act of March 3, 1905 (33 Stat. 1264)."

In a letter of July 19, 1956, addressed to this office, the Railroad Company stated:

> "Since, to the best of our knowledge and belief, no exchange was ever completed for the above described lands, and since the powers of attorney to select and convey have been lost, the Santa Fe Pacific Railroad Company respectfully requests that quitclaim deed covering the above described lands be issued to it by the United States of America as provided by the Act of April 28, 1930 (46 Stat. 257), so that title can be cleared and confirmed to the parties entitled thereto."

The description of the lands given in that letter are the base lands offered in Oregon 011230. Pursuant to the request of July 19, 1956, and other evidence filed in the matter, a quitclaim deed was executed on October 12, 1956, by the Director of the Bureau of Land Management remising, relinquishing and quitclaiming to the Railroad Company the N-1/2SE-1/4, S-1/2NW-1/4 sec. 35, T. 19 N., R. 5 E., G. & S.R.M., Arizona. The deed was executed pursuant to section 6 of the act of April 28, 1930 (46 Stat. 257; 43 U.S.C. 872).

The revesting of title to the base land in the Railroad Company, the party who conveyed the

title to the United States, takes the title to the base land out of the jurisdiction of the United States. Title to this land is now in the Railroad Company, and its vendees, if any. Since there is no base land title in the United States, there can be no selection right based thereon. The contract between the Railroad Company and the Secretary of the Interior has been closed by the return to the Railroad Company of the consideration for the contract.

Accordingly, there is no longer a selection right in the Railroad Company, or its attorney in fact, based on the land involved. Application Oregon 011230 is therefore rejected. The applicant has the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See the enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

/s/ William E. Thomas

William E. Thomas
Acting Chief, Case
Processing Section

APPENDIX E

STATUTES REFERRED TO IN PERTINENT PART:

The Act of June 4, 1897, 30 Stat. 36, provides:

That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reser-

vation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected; Provided further, That in cases of unperfected claims, the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims. * * *

The Act of March 3, 1905, 33 Stat. 1264, provides:

That the Acts of June fourth, eighteen hundred and ninety-seven, June sixth, nineteen hundred, and March third, nineteen hundred and one, 1/ are hereby repealed so far as they provide for the relinquishment, selection and patenting of lands in lieu of tracts covered by an unperfected bona fide claim or patent within a forest reserve, but the validity of contracts entered into by the Secretary of the Interior prior to the passage of this Act shall not be impaired: Provided, That selections heretofore made in lieu of lands relinquished to the United States may be perfected and patents issue therefor the same as though this Act had not been passed, and if for any reason not the fault of the party making the same any pending selection is held invalid, another selection for a like quantity of land may be made in lieu thereof.

1/ The Acts of June 6, 1900, 31 Stat. 614, and of March 3, 1901, 31 Stat. 1037, require the land selected to be confined to vacant, surveyed, nonmineral public lands which are subject to homestead entry.

The Act of September 22, 1922, 42 Stat. 1017, provides:

That where any person or persons in good faith relinquished to the United States lands in a national forest as a basis for a lieu selection under the Act of June 4, 1897 (Thirtieth Statutes at Large, pages 11,36), and failed to get their lieu selections of record prior to the passage of the Act of March 3, 1905 (Thirty-third Statutes at Large, page 1264), or whose selections, though duly filed are finally rejected, the Secretary of the Interior, with the approval of the Secretary of Agriculture, upon application of such person or persons, their heirs or assigns, is authorized to accept title to such of the base lands as are desirable for national-forest purposes, which lands shall thereupon become parts of the nearest national forest, and, in exchange therefor, may issue patent for not to exceed an equal value of national-forest land, unoccupied, surveyed, and non-mineral in character, or the Secretary of Agriculture, may authorize the grantor to cut and remove an equal value of timber within the national forests of the same State. Where an exchange can not be agreed upon, the Commissioner of the General Land Office is hereby authorized to relinquish and quitclaim to such person or persons, their heirs or assigns, all title to such lands which the respective relinquishments of such person or persons may have vested in the United States: Provided, That such person or persons, their heirs or assigns, shall, within five years after the date of this Act, make satisfactory proof of the relinquishment of such lands to the United States by submitting to the Commissioner of the General Land Office an abstract of title to such lands showing relinquishment of the same to the United

States, which abstract or abstracts shall be retained in the files of the General Land Office.

Sec. 2. That if it shall appear that any of the lands relinquished to the United States for the purpose stated in the preceding section have been disposed of or appropriated to a public use, other than the general purposes for which the forest reserve within the bounds of which they are situate was created, such lands shall not be relinquished and quitclaimed as provided therein, unless the head of the department having jurisdiction over the lands shall consent to such relinquishment; and if he shall fail to so consent, or if any of the lands so relinquished have been otherwise disposed of by the United States, other surveyed, nonmineral, unoccupied, unreserved public lands of approximately equal area and value may be selected and patented in lieu of the lands so appropriated or disposed of in the manner and subject to the terms and conditions prescribed by said Act of June 4, 1897, and the regulations issued thereunder: Provided, That applications to make such lieu selections must be filed in the General Land Office within three years after the date of this Act.

The Act of April 28, 1930, Section 6, 46 Stat. 267, Provides:

That where a conveyance of land has been made or may hereafter be made to the United States in connection with an application for amendment of a patented entry or entries, for an exchange of lands, or for any other purpose, and the application in connection with which the conveyance was made is thereafter withdrawn or rejected, the Commissioner of the General Land Office is hereby authorized and directed, if the deed of conveyance has been recorded, to execute a quitclaim deed of the

conveyed land to the party or parties entitled thereto.

The Recordation Act of August 5, 1955, 69 Stat. 534, 43 USC 274 Note, provides:

That any owner of, and any person claiming rights to: Valentine scrip, issued under the Act of April 5, 1872 (17 Stat. 649); Sioux Half-Breed scrip, issued under the Act of July 17, 1854 (10 Stat. 304); Supreme Court scrip, issued under the Acts of June 22, 1860 (12 Stat. 85), March 2, 1867 (14 Stat. 544), and June 10, 1872 (17 Stat. 378); Surveyor General scrip, issued under the Act of June 2, 1858 (11 Stat. 294); a soldier's additional homestead right, granted by sections 2306 and 2307 of the Revised Statutes; a forest lieu selection right assertable under the act of March 3, 1905 (33 Stat. 1264); a lieu selection right conferred by the Act of July 1, 1898 (30 Stat. 597); a bounty land warrant issued under the Act of March 3, 1855 (10 Stat. 701); or any lieu selection or scrip right or bounty land warrant, or right in the nature of scrip issued under any Act of Congress not enumerated herein (except the indemnity selection rights of any State, or the Territory of Alaska), shall, within two years from the effective date of this Act, present his holdings or claim for recordation by the Department of the Interior.

Sec. 2. In the case of a transfer after the effective date of this Act, by assignment, inheritance, operation of law, or otherwise of a holding or claim of any right recorded under the Act, the holding or claim of right so transferred shall be presented to the Department of the Interior within six months after such transfer, for recordation by it; except that where such transfer occurs within the period of two years from the effective date of

this Act and the prior owner has not complied with the provisions of this Act, the owner or claimant by transfer shall have the remainder of such period or a period of six months, whichever is the longer, within which to present his claims or holdings for recordation.

Sec. 3. There shall be endorsed on the evidence of the right or warrant each recordation thereof.

Sec. 4. Claims or holdings not presented for recordation as prescribed herein, shall not thereafter be accepted by the Secretary of the Interior for recordation or as a basis for the acquisition of lands.

The Act of July 6, 1960, 74 Stat. 334, 335, provides:

That the Secretary of the Interior shall certify to the General Accounting Office for audit the claim of any person who relinquished or conveyed lands to the United States as a basis for a lieu selection. . .

(b) For purposes of payment under this Act, the term "person who conveyed lands to the United States" includes (1) the heirs and devisees of any such person and (11)<u>any other person to whom he or his heirs or devisees lawfully assigned</u>, before enactment of this Act, <u>their right to a lieu selection</u> or a reconveyance, or their right to receive authority to cut and remove timber. . .

Sec. 3. The Act of September 22, 1922 (42 Stat. 1017); 16 USC 483) is hereby repealed. No reconveyance of lands to which section 1 of this Act applies shall hereafter be made under section 6 of the Act of April 28, 1930 (46 Stat. 267; re USC 872).

The Act of August 31, 1964, 78 Stat. 751, 43 USC 274 Note, provides for the satisfaction of claims arising out of scrip, lieu selection and similar rights:

That, except for military bounty land warrants, all claims and holdings recorded under the Act of August 5, 1955 (69 Stat. 534, 535), which are not satisfied in one of the ways hereafter set forth, shall become null and void on the later of the two following dates: (a) January 1, 1970, or, in the case of soldiers' additional homestead claims, January 1, 1975; (b) at the termination of any transaction initiated pursuant to this Act.

Sec. 2. Prior to July 1, 1966, holders of claims recorded under the Act of August 5, 1955, may apply to the Secretary of the Interior to have conveyed to them, in satisfaction of their claims, such lands as they may, in their applications, designate. The Secretary shall thereafter convey the selected lands if he finds them to be proper, under existing law, for such disposition, and if the claim upon which an application is based is determined to be valid. As used in this Act, the terms "lands" and "land" include any rights or interests therein.

Sec. 3. (a) Prior to January 1, 1967, the Secretary shall classify, for conveyance and exchange for each type of claim recorded under the Act of August 5, 1955, public lands in sufficient quantity so as to provide each holder of such a claim with a reasonable choice of public lands against which to satisfy his claim. The public lands so classified shall be of a value of not less than the average fair market value, determined by the Secretary as of the date patent issued, of those public lands actually conveyed in exchange for each type of claim since August 5, 1955.

(b) Holders of recorded claims may apply for reasonably compact areas of land so classified, and, upon his determination that the claim upon which an application is based is valid, the Secretary shall convey such lands to the applicant.

Sec. 4. Prior to January 1, 1968, the Secretary shall, by registered mail or certified mail sent to the address of record of each person having an unsatisfied claim offer in satisfaction of such claim lands of a value of not less than the average fair market value of those public lands actually conveyed in exchange for each type of claim since August 5, 1955. Fair market value shall be determined in the manner prescribed in section 3 of this Act. Upon acceptance of the offer, the Secretary shall convey the lands to the claimant, if he determines that the claim is valid.

Sec. 5. In respect of any type of claim recorded under the Act of August 5, 1955, not more than three conveyances of public lands in exchange for which have taken place since that date, the Secretary shall determine the type of claim which it most nearly resembles, and at least four conveyances in exchange for which have taken place since August 5, 1955, and shall, for the purposes of this Act, treat it in all respects as if it were such type of claim.

Sec. 6. Prior to January 1, 1970, or, in the case of soldier's additional homestead claims, January 1, 1975, any person who has a claim recorded pursuant to the Act of August 5, 1955, by written notice to the Secretary of the Interior, or any officer of the Department of the Interior to whom authority to receive such notice may be delegated, may elect to receive cash instead of public land in satisfaction of his claim, at a rate per acre equal to the average value of the lands offered by the Secretary under section 4 of

this Act. Upon a determination that the claim is valid, the Secretary or his delegate shall certify the claim to the Secretary of the Treasury who is authorized and directed to pay the claim out of money in the Treasury not otherwise appropriated. Acceptance of the money shall constitute a full and complete satisfaction of the claim or holding for which the money is paid; Provided, That no agent or attorney acting on behalf of another to procure a payment under this Act shall demand, accept, or receive more than 10 per centum of the payment made, and any agreement to the contrary shall be null and void.

APPENDIX F

EXCERPTS BELOW

Excerpts from House Document No. 613, 59th Congress, 1st session, Congressional Document Series No. 4989, relating to the contract made by Secretary Hitchcock with the Santa Fe Pacific Railroad Company and other owners of lands in Arizona which the Government wished to acquire in order to consolidate the San Francisco Mountains Forest Reserves.

1. Letter from Santa Fe Pacific Railroad Company et al. to Secretary Hitchcock, dated January 11, 1901, offering to surrender titles to lands in odd-numbered sections to be included in forest reserve, except tracts needed for railroad purposes such as rights of way, station grounds, etc.

Washington, D.C., January 11, 1901.
Hon. E. A. Hitchcock,
Secretary of the Interior.

Sir: If the President of the United States, by proclamation, shall immediately extend the limits of the San Francisco Mountains Forest Reserve so as to include all of the odd-numbered sections now owned by us falling within the present exterior limits of such reserve, we, the undersigned holders of title to such odd-numbered sections, hereby agree to surrender to the United States our titles in such forest reserve, under the act of June 4, 1897, on the following basis:

One hundred and eighty thousand acres of our said present holdings to be exchanged for non-timbered public lands lying south of the thirty-seventh standard parallel of latitude, and south of the Tehachapi Range of Mountains, and the remainder of our lands in said enlarged reservation to be exchanged by us under said act of June 4, 1897, and amendments thereto, without any other restrictions whatsoever on the part of the Santa Fe Pacific Railroad Company, it being, however, understood that the company will not be expected to surrender any lands needed to be retained by it for railroad purposes; and such railroad purposes being understood to include rights of way of all kinds, station grounds, pumping stations, dams, reservoir sites, stone quarries, deposits of cinders, gravel, or other material for ballast, and also other land needed for railroad purposes, but not including lands held solely for the timber thereon.

This proposition is made with the further understanding that in case of its acceptance, the Government will, in every reasonable way, so expedite all necessary surveys and approval thereof, and the issuance of patent to the railroad company, as to enable said company, and the undersigned holders of title under its grant, to carry out this agreement.

Very respectfully,

E. D. Kenna,
Vice-President and General Solicitor
Santa Fe Pacific Railroad Company.
William F. Baker,
E. B. Perrin,
Robert Perrin,
By E. B. Perrin,
Attorney in Fact.

Approved, and the Commissioner of the General Land Office will carry the above into immediate effect.

E. A. Hitchcock,
Secretary.

House Document No. 613, page 19

2. Letter of June 6, 1901 from Secretary Hitchcock to Santa Fe Pacific Railroad Company breaking off negotiations because Government could not acquire title to the entire acreage in the odd-numbered sections as had been understood from letter of January 11, 1901. Over 15% of the estimated 975,000 acres in the odd-numbered sections were covered by outstanding contracts for timber cutting.

Department of the Interior,
Washington, June 6, 1901.

E. D. Kenna, Esq.,
Vice-President and General Solicitor.
Santa Fe Pacific Railroad Company,
Chicago, Ill.

Sir: On January 11, 1901, the owners of the odd-numbered sections adjoining and within the exterior limits of the San Francisco Mountains forest reserves in Arizona agreed that if the President of the United States, by proclamation, would immediately extend the limits of said reservation so as to include all of the odd-numbered sections

then owned by them falling within the exterior limits of said reserves, they, as holders of the title to said odd-numbered sections, would surrender to the United States their title in such lands under the act of June 4, 1897, provided they were permitted to exchange said holdings for other lands elsewhere, on the basis set forth in said agreement.

Subsequently a telegram was received at this Department from Mr. J. C. Phelan, chairman of the board of supervisors, calling attention to the fact that a large protion of the acreage of said odd-numbered sections could not be relinquished by said owners to the Government for reasons therein stated, and that said proposed consolidation would only enable the Government to obtain title to a portion of said odd-numbered sections.

That telegram was by me transmitted to the various owners of said odd-numbered sections, with a request for a reply to the allegations therein contained.

On March 12 the various owners of said odd-numbered sections replied to that communication. From those replies it appears that of the acreage owned by the Santa Fe Pacific Railroad Company 66,000 acres of timbered lands can not be relinquished to the Government because of the fact that they are covered by timber contracts with the Arizona Lumber Company and one J. N. Denny; that of the acreage owned by W. F. Baker, president of the Saginaw and Manistee Lumber Company, 33,000 acres of timbered lands will have to be retained by said company; and that of the acreage owned by the Perrin Brothers 48,500 acres of timbered lands can not be relinquished to the Government; in other words, that of the acreage embraced in said odd-numbered sections, 147,500 acres of timbered lands can not be relinquished to the Government, and as the estimated area of the odd-numbered

sections is about 975,000 acres the Government, if it accepted the relinquishment of the remaining lands on the terms proposed, would fail to receive title to over 15 per cent of the lands embraced in said odd-numbered sections.

The Department is further in possession of information tending to show that of the remainder of the acreage within said odd-numbered sections a large part thereof has been denuded of its timber and that a large portion of the remainder is in no sense timbered land.

It was the understanding of this Department that the entire acreage embraced in said odd-numbered sections would be relinquished by the owners thereof to the Government. That, it appears, can not be done, and as the relinquishment of the remaining lands would not enable the Government to carry out its purpose of consolidating all the timbered lands in that region for the purpose of conserving the water supply the Department declines to take any further action looking toward the extension of the boundaries of said reservation or the exchange of said lands on the terms proposed.

Very respectfully,

E. A. Hitchcock,
Secretary.

House Document No. 613, page 92

3. Letter of December 20, 1901 from Santa Fe Pacific Railroad Company et al. to Secretary Hitchcock offering to transfer all the land, except railroad sites so that the United States will be enabled to create a reservation wherein it will become the owner of all the land owned by the writers.

December 20, 1901.

Hon. E. A. Hitchcock,
Secretary of the Interior.

Sir: Referring to the proposed consolidation of the San Francisco Mountains Forest Reserve, wherein you have expressed a desire to secure the transfer of title to the United States of all the odd-numbered sections lying within the exterior limits thereof, we, the undersigned, owners of such lands, respectfully submit:

(omitting recitals concerning other land owners)

This company is the owner of 507,358 acres, more or less, of such odd-numbered sections, and agrees, in the event of said lands being so reserved, to relinquish to the United States the title to all thereof, provided that as to (Riordan) 45,000 acres described on list herewith marked "Santa Fe Pacific 1," the United States will permit this company, its successors, assigns, or lessee, to cut the timber off the same under rules and regulations hereto attached and marked "Santa Fe Pacific 2."

Said company further agrees that should such rules and regulations be not acceptable to the United States, it will either relinquish said lands to the United States, subject to timber contracts now existing with respect to same, or permit said land to be excluded from the reservation altogether, binding itself in the latter event to not authorize the grazing of sheep thereon so long as said lands lie within the exterior limits of the forest reserve.

Said company further agrees that it will exchange 101,680 acres of said land for an equal area of nontimbered public land of the United States lying south of the thirty-seventh parallel and the Tehichipa range of mountains, and exchange the balance under the act of June 4, 1897, and amendments thereto, without any other restrictions whatsoever.

Said company makes it a part of this agreement that it will not be expected to relinquish any lands needed to be retained by it for railroad

purposes such as rights of way of all kinds, station grounds, pumping stations, dams, reservoir sites, stone quarries, deposits of cinders, gravel, or other material for ballast and other land needed for railroad purposes, but not including land held solely for the timber thereon.

Under the conditions above set forth the United States will be enabled to create a reservation wherein it will become the owner of all the land owned by the undersigned, and can control and supervise the cutting of timber off specified lands. Should the same prove acceptable, the undersigned agree that they will, preliminary to the creation of the reservation, designate to the honorable Secretary their respective portions of the 180,000 acres to be selected from nontimbered lands south of the thirty-seventh standard parallel and the Tehichipa Mountains, provided that should the same be found of the character described, they will be reserved by the United States for selection by us, and the proclamation reserving the odd-numbered sections immediately issue.

The undersigned further agree that immediately from the issuance of such proclamation they will not graze any sheep over any of the lands so reserved, nor authorize any other persons to do so, and the United States will in every reasonable way so expedite all necessary surveys and approval thereof, and the issuance of patents to lands of the undersigned covered by this agreement, as will enable us to carry out this agreement as quickly as possible.

It is further respectfully submitted that the aggregate of nontimbered public lands to be selected as above set forth is 180,000 acres, and it may be necessary in order to facilitate such

selections for the respective portions of same to be selected by each of the undersigned to be changed, the total, however, to be the same, to wit, 180,000 acres.

Very respectfully,

Aztec Land and Cattle Company (Limited),
By Seligman & Seligman,
Attorneys in Fact
Saginaw and Manistee Lumber Company,
By Wm. F. Baker, President.
Wm. F. Baker,
E. B. Perrin,
Robert Perrin,
By E. B. Perrin,
Attorney in Fact,
Santa Fe Pacific Railroad Company
By Howell Jones, Land Commissioner

House Document No. 613, pages 7, 8 and 9

4. After further correspondence in January, 1902, concerning the surrender of lands affected by timber cutting contracts, the land owners offered a final joint proposition for the relinquishment of all the lands sought by the Government in a letter of March 28, 1902. They stated:

March 28, 1902.

Hon. E. A. Hitchcock,
Secretary of the Interior.

Sir:

* * *

If the proposal made by us in our letter to you of December 20, 1901, as modified by your letter to Messrs. Britton & Gray, dated January 18, 1902, and by the letter of Messrs. Britton & Gray to you,

dated January 22, 1902, and by this letter, is accepted by you and acted upon by the establishment of a consolidated forest reservation, as indicated in such correspondence, we pledge ourselves to immediately begin the relinquishing of our private holdings within the limits of said reservation, and the selection of other lands in lieu thereof, according to the provisions of the act of Congress approved June 4, 1897 (30 Stat. p. 36), and the act of Congress approved June 6, 1900 (31 Stat. p. 614), and in full accord with the terms of the agreement evidenced by said correspondence. And we agree to use all reasonable diligence in prosecuting the work of relinquishment and selection to a final conclusion at the earliest reasonable time. Of course the time within which this work of relinquishment and selection can be completed will be largely in the hands of the Interior Department with respect to the lands which remain unsurveyed and unpatented, and as to them we will not, as we understand it, be able to make any relinquishment or any lieu selection until the work of surveying and patenting is done.

We further agree to exercise our right of lieu selection upon the 225,000 acres of non-timbered lands lying south of the thirty-seventh parallel and the Tehichipa Range of mountains before exercising the right of lieu selection upon any other lands.

We further agree that from the date of the proclamation establishing such consolidated forest reserve thenceforward, if the reservation is continued, we will not encumber, sell, or otherwise affect the existing title to the lands to be relinquished, excepting as may be necessary or convenient as a part of the process of conveying a sufficient title thereto to the United States, and will not dispose of or attempt to dispose of

the timber thereon, or any portion thereof, excepting as to those lands covered by the outstanding timber contracts hereinbefore referred to, and will not, by lease, license, or otherwise, confer upon any person or company whatsoever any right to graze, hold, or maintain live stock of any kind or character over or upon any of the lands so to be relinquished.

Very respectfully,

Saginaw and Manistee
Lumber Company
By Wm. F. Baker, President.
William F. Baker.
Santa Fe Pacific Railroad
Company,
By Howel Jones, Land
Commissioner.
Robert Perrin,
By L. E. Payson, Attorney.
E. B. Perrin,
By L. E. Payson, Attorney.
Aztec Land and Cattle
Company (Limited),
By Theodore Seligman,
Attorney.

House Document No. 613, pages 10, 11 and 12

5. The Secretary accepted by letter of April 2, 1902, as follows:

Department of the Interior
Washington, April 2, 1902.

Gentlemen: I have considered the letter of the Saginaw and Manistee Lumber Company et al., of the 28th ultimo, relating to the proposed consolidation of the San Francisco Mountains Forest Reserves and the inclusion therein of the odd-numbered sections. The proposals made in said letter and the forms of deed of relinquishment accompanying

the same meet with my approval. Upon the faith of the arrangement, evidenced by said letter and the prior correspondence therein referred to, I have to-day requested the Commissioner of the General Land Office to prepare for the President's consideration a proclamation creating a single forest reserve to be known as the "San Francisco Mountains Forest Reserve," embracing the lands now included within the San Fracisco Mountains Forest Reserves and the odd-numbered sections and other lands within the exterior limits of such existing reserves.

I beg to request that within as short a time as may be convenient you will file in this Department true copies of all the contracts to cut or remove timber mentioned in your letter of the 28th ultimo, or in the prior correspondence, the contracts, as so filed, to embrace the modifications proposed in your letter of the 28th ultimo.

I request that in this matter you cooperate as fully as may be with Messrs. Robert Perrin and E. B. Perrin, who join in the letter of the 28th ultimo and prior letters, and who are represented by Hon. L. E. Payson.

The relinquishment of base lands, the proof of title thereto, the selection of lieu lands, the proof of the character and condition thereof, and other kindred matters must conform to the regulations and decisions under the acts of June 4, 1897 (30 Stat.L.,36), and June 6, 1900 (31 Stat. L.,614).

Very respectfully,

E. A. Hitchcock,
Secretary.

House Document 613, page 13

6. Secretary Hitchcock directed the Commissioner of the General Land Office to prepare the proclamation creating the consolidated reserve,

which was signed by the President on April 12, 1902 (32 Stat. L.1991):

Department of the Interior
Washington, April 2, 1902.

Sir: In relation to the proposed consolidation of the existing San Francisco Mountains Forest Reserves and the inclusion in the consolidated reserve of the odd-numbered sections, a conference was recently had before the President between myself and representatives of parties to be affected, as a result of which an arrangement has been agreed upon or effected which is set forth and evidenced by letters between those interested in the private lands to be included within the limits of said reserves and myself, copies of which letters are hereto attached.

You will immediately prepare for the President's consideration and transmit to this Department a proclamation creating a single forest reserve to be known as the "San Francisco Mountains Forest Reserve," embracing the lands now included within the San Francisco Mountains Forest Reserves and the odd-numbered sections and other lands within the exterior limits of such existing reserves.

The correspondence, copies of which are hereto attached, consists of the following:

Letter from the Aztec Land and Cattle Company (Limited), to the Secretary of the Interior, dated December 20, 1901.

Letter from the Secretary of the Interior to Messrs. Britton & Gray, dated January 18, 1902.

Letter by Messrs. Britton & Gray to the Secretary of the Interior, dated January 22, 1902.

Letter from the Saginaw and Manistee Lumber Company et al. to the Secretary of the Interior, dated March 28, 1902.

Letter from the Secretary of the Interior to Messrs. Britton & Gray, dated April 2, 1902.

Letter from the Secretary of the Interior to Hon. L. E. Payson, dated April 2, 1902.

Also the inclosures contained in said letters.

Very respectfully,

E. A. Hitchcock
Secretary.

House Document No. 613, page 14

7. On May 14, 1902, the Secretary wrote to Santa Fe Pacific Railroad Company, stating;

"The lands in one ownership will probably constitute the bases for many separate selections made at different times and at different land offices, and to require a separate abstracting for each relinquishment of lands having a common chain of title would, under the circumstances, serve no useful purpose. Each owner contemplating an exchange, as heretofore agreed upon in correspondence had with this Department, may, therefore, file a general abstract covering all his lands within the reserve, which are within the same county, and bringing the title down to and in such owner. This abstract will be subject to the acceptance of the Commissioner of the General Land Office, acting under the supervision of the Secretary of the Interior. Thereafter, in relinquishing lands covered by such abstract and selecting other lands in lieu thereof, there need be no filing of further evidence of title in the relinquished lands than a supplemental abstract, covering the period from the date of the general abstract to that of the supplemental abstract, and showing the proper transmission of title to the United States. The deed of relinquishment and supplemental abstract should in each instance accompany the corresponding lieu selection."

House Document No. 613, page 14

8. The Commissioner of the General Land Office and the Secretary of the Interior reported to Congress in March, 1906, the approval of general abstracts covering large areas of the land covered by the contract, and the progress made toward consummation of the contract, as follows:

* * * *

"The owners of odd-numbered sections of land situated within the San Francisco Mountains Forest Reserve have from time to time, in accordance with your order of May 14, 1902, submitted general abstracts covering large areas of land bringing the title in themselves down to the date of the preparation of the abstract, and such abstracts when received in this Office have been carefully examined and submitted to your Department with the recommendation of this Office, either as to their approval or their rejection. If approved by your Department, a note has been made of such approval in a book kept for that purpose, and the abstracts filed in such manner as to be easily accessible to clerks and examiners who may thereafter be required to consider them.

The plan, while no doubt relieving the applicants from considerable expense, has been found to greatly expedite the business of this Office in the examination of the titles to such lands. For instance, an abstract covering 100,000 acres of land having a common source of title and each tract being similarly affected by transfers, court proceedings, or in any other manner, can be easily disposed of as though only 40 acres were involved in the proceeding. Examination of the supplemental abstracts in a very simple matter, as under the terms of the agreement no transfers other than to the Government were permitted, etc.

When the President's proclamation was issued April 12, 1902, creating the San Francisco Mount-

ains Forest Reserve, a large part of the odd-numbered sections of land included in the consolidated reserve held in private ownership was unsurveyed. To secure the survey of the lands the Santa Fe Pacific Railroad Company has from time to time made special deposits under the provisions of the act of February 27, 1899 (30 Stat. L., 892). After the approval of the surveys and the filing of the plats thereof in the local land office, the successors in interest of the Atlantic and Pacific Railroad Company to which company the original grant inured, have listed the lands, the lists have been examined by this Office in the regular course and approved by your Department if found correct, and patents issued thereon, after which the lands covered by the patents became available as selection bases.

Owing to difficulties encountered in the execution of the field work, the last of the surveys were not completed and accepted by this Office until September, 1905. There are now pending in this Office two lists by the Santa Fe Pacific Railroad Company, successor in interest to the Atlantic and Pacific Railroad Company, aggregating 32,262.94 acres. With this exception all of the lands within the railroad company limits situated in the San Francisco Mountain Forest Reserve have been patented to the Atlantic and Pacific Railroad Company where it was found entitled thereto, or to its successors in interest.

Selections have been made in the various land offices and received in this Office based on all the lands affected by the contract hereinbefore referred to with the Secretary of the Interior, except 178,666.21 acres. This area includes the 32,262.94 acres above referred to as being now embraced in lists pending before the Office, and 5,438.92 acres where the selections have been canceled. About 5,000 acres of this area must be

satisfied by the selection of nontimbered land south of the thirty-seventh parallel and the Tehichipa Range of Mountains, the remainder may be satisfied by the selection of any surveyed non-mineral public land subject to homestead entry.

There has been little or no opposition manifested toward the consolidation of the San Francisco Mountains Forest Reserves into the San Francisco Mountains Forest Reserve in so far as this Office has been advised, except by the local county authorities in the counties in which the reserve is situated. The removal of such a large area from taxation has excited some opposition on the part of the citizens of those counties.

Very respectfully,

W. A. Richards,
Commissioner.

The Secretary of the Interior.

House Document No. 613, pages 17 and 18

APPENDIX G

Record of Unpublished Cases, Director, Bureau of Land Management, with respect to Forest Lieu Selection Rights under the Act of June 4, 1897 (30 Stat. 36), as amended by Act of June 6, 1900 (30 Stat. 14). Selection rights assertable under the Act of March 3, 1905 (33 Stat. 1264) are recorded as a part of this record. This is a record of all of the Forest Lieu Selection Rights arising under the foregoing Acts recorded under the Recordation Act of August 5, 1955 (69 Stat. 534) 43 USC 274 Note. The Santa Fe Pacific Railroad Company's Forest Lieu Selection Rights are included in this category.

Cert. No.	Name & address of Claimant	Acreage
None	Pacific Gas & Electric Co. 245 Market, San Francisco 6, California, Att: Mr. B.K. Dunshoe, Mgr.,Land Dep't	80.00
None	Richard M. Lade 14345 Friar St. Van Nuys, Calif.	160.00
None	" " "	40.00
Abstract of title #4286	Mr. E. L. Cord Dyer, Nevada	40.00
Abstract of title #2396	" " "	80.00
Abstract of title #2397	" " "	80.00
Abstract of title #2369	" " "	80.00
None	" " "	40.00
None	" " "	40.00

Assignment	Misc. No.	Date Rec.	Remarks
Quitclaimed to Santa Fe Pac. R.R.Co.--deed dated 12/18/56--See Misc. 71158	70568	1/5/56	Base land: S-1/2SE-1/2 Sec.17,T.22N. R.9E,G&SRM Ariz.
Quitclaimed to Santa Fe Pac.R.R.Co.--deed dated 6/27/56--see Misc. 70116	72055	5/31/56	Base Land: NW-1/4 Sec.27, T.22N.R.9E,G& SRM,Arizona
Quitclaimed to C. W. Clarke--deed dated 1/18/57-see Misc.75331	72056	5/31/56	Base Land: SE-1/4NW-1/4 Sec35,T14S,R28E MDM,Calif.
SEE Los Angeles 012053	72731	8/1/56	Base: SE-1/4 SE-1/4,Sec.1, T.20N,R7E,G&SRM Arizona
Quitclaimed to Santa Fe Pac.R.R.Co.--deed dated Dec. 6, 1955--see Misc. 69022	72731	8/1/56	Base: N-1/2 SW-1/4sec.33, T25N,R9E,G&SRM Arizona
" " "	72731	8/1/56	Base: S-1/2 SW-1/4,sec.33, T25N,R9E, G& SRM, Arizona
Quitclaimed to Santa Fe PAc.R.R.Co.--deed dated 12/8/1955--See Misc. 69022	72731	8/1/56	Base: S-1/2 SW-1/4,sec.15, T25N,R8E, G& SRM, Arizona
Used as base in lieu selection Susanville 01128, Patent 844302	72731	8/2/56	Base: SW-1/4 NW-1/4,Sec.5. T27N, R13E, G&SRM Arizona
Quitclaimed to Santa Fe Pac.R.R.--deed dated 1/4/1959--See Misc. 71157	72731	8/2/56	Base: SW-1/4 NW-1/4,Sec.3, T27N,R5E, G& SRM Arizona

Cert. No.	Name & Address of Claimant	Acreage
None	Mr. E. L. Cord Dyer, Nevada	40.04
None	" " "	40.00
None	" " "	40.00
None	" " "	40.00
None	" " "	40.00
None	" " "	40.00
None	" " "	40.00
Abstract of title #4143	Santa Barbara Rodeo Co. 1545 Wells Avenue Reno, Nevada	80.00
Abstract of title #4749	" " "	40.00

Assignment	Misc. No.	Date Rec.	Remarks
See L.S. 14059 and Sacramento 012327	72731	8/2/56	Base: Lot 9, sec.21,T20N, R4E,G&SRM Ariz.
Used as base in lieu selection, 01128 Susanville, Patent 844302	72731	8/2/56	Base: SE-1/4 NW-1/4,sec.5. T27N, R3E. G&SRM Arizona
See Susanville 01372 Pat.#843727--used as base in this selection	72731	8/2/56	Base: SE-1/4 SE-1/4,sec.3. T27N,R4E,G& SRM Arizona
Used as base in lieu selection Susanville 01124, patent #844301	72731	8/2/56	Base: SE-1/4 NE-1/4,sec.3, T27N,R5E,G& SRM,Arizona
Quitclaimed to Santa Fe PAC.R.R.--deed dated 1/4/57--See Misc. 71157	72731	8/2/56	Base: SE-1/4 NW-1/4,sec.3, T27N,R5E,G& SRM Arizona
Quitclaimed to Santa Fe Pac.R.R.--deed dated 1/4/57--See Misc. 71157	72731	8/2/56	Base: NW-1/4 NE-1/4,sec.3. T27N,R5E, G& SRM,Arizona
Quitclaimed to Santa Fe Pac.R.R.--deed dated 1/4/57--See Misc. 71157	72731	8/2/56	Base: SW-1/4 NE-1/4,sec.3, T27N,R5E,G& SRM,Arizona
Asgd. to E. L. Cord on 6/7/62--See Misc. 88539	75728	5/23/57	Base: S-1/2 SE,Sec.21,T 20N,R6E,G&SRM Arizona
Asgd. to E. L. Cord on 6/7/62--See Misc. 88359	75728	5/23/57	Base: NW SW, Sec.29,T20N, R5E,G&SRM Arizona

Cert. No.	Name & Address of Claimant	Acreage
Abstract of title #2142	Santa Monica Wilshire Co. 1545 Wells Avenue Reno, Nevada	160.00
Abstract of Title #3163	" " "	160.00
Abstract of Title #3768	" " "	83.17
Abstract of Title #4775	" " "	40.00
Abstract of Title #3134	Camden Dayton Co. 1545 Wells Avenue Reno, Nevada	160.00
Abstract of Title #3233	" " "	80.00
Abstract of Title #3434	" " "	80.00
Abstract of Title #4234	" " "	40.00
Lieu selection #2327	" " "	240.00

Assignment	Misc. No.	Date Rec.	Remarks
Asgd. to E. L. Cord on 6/7/62 See Misc. 88359	75727	5/23/57	Base: NESec.27, T.22N, R9E, G & SRM, Arizona
Asgd. to E. L. Cord on 6/7/62--see Misc. 88359	75727	5/23/57	Base: SE Sec.1, T16N,R8E, G&SRM, Ariz.
Asgd. to E. L. Cord on 6/7/62--see Misc. 88359	75727	5/23/57	Base: Pt.lying so.A.T.&S.F.Ry as shown on map filed in GLO.on 12/21/04 of ENW N&SE,SE&E Sec1, T21N,R5E,G&SRM Arizona
Asgd. to E. L. Cord on 6/7/62--See Misc. 88359	75727	5/23/57	Base: SW NW, Sec.33,T20N, R5E,G&SRM,Ariz.
Asgd. to E. L. Cord on 6/7/62--See Misc. 88359	75734	5/23/57	Base:NW-1/4 Sec.21,T19N, R6E,G&SRM,Ariz.
Asgd. to E. L. Cord on 6/7/62--See Misc. 88359	75734	5/23/57	Base:N-1/2 NE-1/2,Sec.23, T18N,R8E,G& SRM,Arizona
Asgd. to E. L. Cord on 6/7/62--See Misc. 88359	75734	5/23/57	Base:S-1/2 SE-1/2,Sec.25, T19N,R7E,G & SRM,Arizona
Asgd. to E. L. Cord on 6/7/62--See Misc. 88359	75734	5/23/57	Base:SE-1/4 NE-1/4Sec 17, T19N,R5E,G & SRM,Arizona
Asgd. to E. L. Cord on 6/7/62--See Misc. 88359	75734	5/23/57	Base:N-1/2SW, N-1/2SE,Sec.16, T2N,R10W,N-1/2 NW,Sec.2,T4N, R10W,SBM,Calif.

Cert. No.	Name & Address of Claimant	Acreage
Helena 023175	Funston Land Co.,Inc. 620 Bartlett Bldg. Los Angeles 14, Calif.	162.487
Coeur d'Alene 02827	" " "	160.00
Oregon 05502	Donald R. Wheeler, Trustee 161 West Holt Avenue Pomona, Calif.	80.00
L. S. 3590, 3591, 3592, 3593, 3594	" " "	80.00
L. S. 1969	" " "	160.00
Carson City 021477	" " "	160.00
None	" " "	80.48
Abstract of title #4960	" " "	18.68
Abstract of title #4570	" " "	56.88

Assignment	Misc. No.	Date Rec.	Remarks
7/31/1957 Asgd. to Frank A. Packmayr & others--See Misc. No. 76569	76135	6/28/57	See Helena 023175 for excess base--letter "K" of 5/18/1932.
Asgd. to J. W. Utter, Jr.--see Misc. No. 79043	76136	6/28/57	Base:E-1/2 NE-1/4,N-1/2 SE-1/4 Sec.21, T1N,R4E,BHM South Dakota
80.00 acres used	76127	6/28/57	L.S.Susanville 01422,Base: S-1/2SE-1/4 Sec.36,T7S, R27E,MDM,Calif.
Quitclaim deed issued to E.W.Clarke & wife for this base land. Selection right no longer exists--see 47=75331	NOT VALID 76114	6/28/57	Base: E-1/2 SE-1/4 Sec.16, T.16S,R32E, M.D.M,Calif.
Quitclaimed to E.O. Miller & Cora E. Miller deed dated 3/27/56--See Misc. 69104	76115	6/28/57	Base: NW-1/4 Sec.16,T.25S, R32E,M.D.M. Calif.
Trans, to Thomas Lockett, et al,by Court Order--See 47-76120,rerecorded on page 12	76120	6/28/57	Base:SE-1/4 Sec.27,T18N, R4E,G&SRM, Arizona
Quitclaimed to Santa Fe Pac RR--deed dated 12/8/55--see Misc. 69022	76121	6/28/57	Base:Lots 3 & 4 of NW-1/4, Sec.5,T17N, R8E,G&SRM,Ariz.
Used and patented L.A. 0167168	76122	6/28/57	Base:Pt SW-1/4 NW-1/4Sec.1, T21N,R5E,G&SRM Ariz.lying S & E of R/W ATSF Ry.Co.
Lot 12 quitclaimed to Santa Fe Pac RR--deed dated 7/31/56--See Misc. 70081	76123	6/28/57	Base:Lot 12 (SE-1/4SE-1/4) Sec.33,T21N, R5E,G&SRM, Ariz.

Cert No.	Name & Address of Claimants	Acreage
Abstract of title #4232	Olive V. Navarre 838 Nectarine Sunnyvale, Calif.	40.00
L.S. 4064 Phoenix 012852	Donald J. & Grietje Hodge and others --See application for names of all claimants	80.00
L.S. 3148 SanFrancisco 015172	Vernon S. Speck and others See application for names of all claimants	80.00
Coeur d'Alene 013860	Potlatch Lumber Company Lewiston, Idaho	80.00
Coeur d'Alene 013863	" " "	320.00
Coeur d'Alene 013862	" " "	80.00
Coeur d'Alene 013852	" " "	192.65
Coeur d'Alene 013851	" " "	40.00
Coeur d'Alene 013861	" " "	80.00

Assignment	Misc. No.	Date Rec.	Remarks
Quitclaimed to Santa Fe Pac.RR--deed dated 6/29/56--see Misc. 70116	76126	6/28/57	Base: NE-1/4 NE-1/4 Sec.17, T19N,R5E, G & SRM, Arizona
See rerecordation on page 12--filed Los Angeles 0165126	76109	6/28/57	Base:E-1/2 NW-1/4 Sec.29, T26S,R23E, M.D.M.,Calif.
Departmental decision D.37236 of 5/1/1919, denies right of reselection--Seclection right valid--see L.S. 31 & (A-1442)	RIGHT USED IN RIVERSIDE 01518 76128	6/28/57	Base:W-1/2 NE-1/2 Sec.16, T 18S,R32E, M.D.M.,Calif.
Quitclaimed to F.E.Hyde & Co.--deed dated 9/19/57 See Coeur d'Alene 013860 Asgnd to George E. Rubedew on 11/4/63--see 47-76217	76217	7/15/57	Base: S-1/2 NW-1/4 Sec.16, T5N,R21W, S.B.M.,Calif.
Quitclaimed to George L. Ramsey--deed dated 9/18/57--see Coeur d' Alene 013863.Asgd to George E. Rubedew 11/4/63--see 47-76218	76218	7/15/57	Base: N-1/2 Sec.21,T28S, R32E,M.D.M., Calif.
Quitclaimed to F.A.Hyde & CO. Deed dated 9/18/57 see Coeur d'Alene 013862 Asgd. to George E. Rubedew See Misc. 47-76219	76219	7/15/57	Base: E-1/2 SW-1/4 Sec.36, T16S,R31E, M.D.M.,Calif.
Quitclaimed to J.R. Johnston--deed dated 9/19/1959--see Coeur d' Alene 013852.Asgd. to George E. Rudedew 11/4/63 See 47-76220	76220	7/15/57	Base: W-1/2 SE-1/4Sec.32, T5N,R15W,&Lots 3&4,SW-1/4NE-1/4 Sec.3,T4N,R15W, S.B.M.,Calif.
Quitclaimed to Joseph William Belden--deed dated 9/19/59 See Coeur d'Alene 013851 Asgd. to George E. Rudedew 11/4/63--see 47-76236	76236	7/15/57	Base: NW-1/4 NE-1/4,Sec 16, T13S,R31E, M.D.M.,Calif.
Quitclaimed to William W.& Nora S. Head--deed dated 9/18/57--see Coeur d'Alene 013861.Asgd. to George E. Rubedew 11/4/63--see 47-76238		7/15/57	Base: E-1/2 SW-1/4 Sec.35, T1N, R20E, W.M.,Oregon

Cert. No.	Name & Address of Claimant	Acreage
Abstract of Title #1068	Donald R. Wheeler, Trustee 161 West Holt Avenue Pomona, California	160.00
Helena 023175	Frank A. Pachmayr and others 4215 Inco Boulevard Culver City, California	162.487
Carson City 021477	Kenneth D. Miller, Trustee 1025 Conn. Ave.,N.W. Washington 6, D.C.	40.00
Carson City 021477	" " "	40.00
Carson City 021477	" " "	40.00
Carson City 021477	" " "	40.00
Carson City 021477	" " "	40.00
Abstract of title #4989	" " "	40.00
Abstract of title #2384	" " "	40.00

Assignment	Misc. No.	Date Rec.	Remarks
Quitclaimed to Santa Fe Pac.RR--deed dated 10/11/56--see 71311	76562	7/31/57	Base: NW-1/4 Sec.33,T.30N, R2E,G&SRM, Arizona
See 76135 for prior ownership (excess base out of S-1/2SE-1/4 Sec.27,all Sec.29,Idaho)	USED & PAT'D 76569	7/31/57	See Helena 023175 for excess base Letter "K" of 5/18/1932
Quitclaimed to Santa Fe Pac RR--deed dated 6/27/56--see Misc. 70116	76498	8/5/57	Base:SW-1/4 NE-1/4 Sec 17, T19N,R5E, G& SRM,Arizona
Quitclaimed to Santa Fe Pac RR--deed dated 7/31/56 --see Misc. 70081	76499	8/5/57	Base: NW-1/4 SE-1/4 Sec.17, T21N,R5E,G& SRM, Arizona
Quitclaimed to Santa Fe Pac RR--deed dated 7/31/56--see Misc. 70081	76491	8/5/57	Base: NE-1/4 SW-1/4 Sec.29, T21N,R5E, G& SRM, Arizona
Quitclaimed to Santa Fe Pac.RR--deed dated 7/31/56--see Misc. 70081	76492	8/5/57	Base: NW-1/4 SW-1/4 Sec.29, T21N,R5E, G& SRM, Arizona
Quitclaimed to Santa Fe Pac.RR--deed dated 7/31/56--see Misc. 70081	76493	8/5/57	Base: SE-1/4 SW-1/4 Sec.29, T21N, R5E, G& SRM, Arizona
Asgd. to Scrip Nevada on 4/23/63--see 47-76494	76494	8/5/57	Base: NW-1/4 NE-1/4 Sec.29, T29N, R2E, G&SRM, Arizona
Quitclaimed to Santa Fe Pac.RR--deed dated 12/8/1955--see Misc. 69022	76495	8/5/57	Base: NE-1/4 NW-1/4 Sec.19, T25N, R8E, G&SRM, Arizona

Cert. No.	Name & Address of Claimant	Acreage
None	Kenneth D. Miller, Trustee 1025 Conn. Ave.,N.W. Washington, D.C.	40.00
Abstract of title #4691	" " "	40.00
Abstract of title #3217	" " "	39.00
L. S. No. 2204	" " "	80.00
Roseburg 05700	Tibor Fejar, Trustee 6139 Orange Street Los Angeles 48, Calif.	40.00
Abstract of title #4210	Cow Creek Sheep Co. P. O. Box 587 Rawlins, Wyoming	160.00
NONE	" "	200.00
None	Preston Nubber Corporation Price, Utah, by H. Byron Mock, Atty at Law, 1003 Continental Bank Bldg. Salt Lake City, Utah	520.00

Assignment	Misc. No.	Date Rec.	Remarks
Quitclaimed to Santa Fe Pac.RR--deed dated 6/11/1956--see Misc. 69207	76496	8/5/57	Base: NE-1/4 NE-1/4 Sec.23, T19N, R8E, G&SRM, Ariz.
Quitclaimed to Santa Fe Pac.RR--deed dated 7/31/56--see Misc. 70081	76500	8/5/57	Base: SW-1/4 NE-1/4 Sec.23, T20N, R5E, G&SRM,Ariz.
Quitclaimed to Santa Fe Pac.RR--deed dated 4/3/57--see Misc. 71307	76501	8/5/57	Base:Lot 1 of NW-1/4 Sec 19, T18N,R8E,G& SRM,Arizona
Quitclaimed to Charles F. & Margerite Magianis deed dated 3/3/58--see Misc. 74754	76503	8/5/57	Base:N-1/2 NE-1/4 Sec.18, T5S,R24E,MDM, Calif.
	76579	8/7/57	Base: NE-1/4 NE-1/4 Sec.36, T9S,R30E,MDM, Calif.
Asgd. to Battle Mountain Co. See 47-76643	76643	8/7/57	Base: S-1/2 NW-1/4,N-1/2 SE-1/4 Sec.35, T19N,R5E,G& SRM,Arizona
Asgd. to Battle Mountain Co. See 47-76644	76644	8/7/57	Base: NE-1/4 NW-1/4 &NE-1/4 Sec.16,T6N, R18E,MDM,Calif. See Coeur d' Alene 01034, 01040,1,2,3
See Phoenix 013384 pending selection as to 200 acres 320 acres used and patented	78135	1/14/58	Base:N-1/2, SW-1/4,NW-1/4 SE-1/4 Sec.16, T9S,R28E,MDM, Calif.(C.W. CLARKE,last assignee

Cert. No.	Name and Address of Claimant	Acreage
None	Preston Nubber Corp. Price, Utah, by H. Byron Mock, Atty.at Law, 1003 Continental Bank Bldg. Salt Lake City, Utah	640.00
None	" " "	320.00
Coeur d'Alene 02827	J. W. Utter, Jr. Los Angeles, Calif. c/o Lewis E. Hoffman, Atty. at Law, 711 - 14th St.,N.W. Washington 5, D.C.	160.00
None	Battle Mountain Co. c/o Brimmer and Brimmer, Atty. First National Bank Bldg. Rawlins, Wyoming	200.00
Abstract of Title #4210	" " "	160.00
L.S. 4064 Phoenix 012852	Donald J. Hodge and others (See appl'n for all names)	80.00
Coeur d'Alene 02827	Tucscon Title Ins. Co. P.O. Box 5714 Tucson, Arizona	160.00
Carson City 021477	Thomas Lockett and others. See file for names of all claimants of this right.	160.00

Assignment	Misc. No.	Date Rec.	Remarks
Used as base in lieu selections--see forest lieu abstract file #57	78135	1/14/58	Base:S-1/2Sec. 36,T8N,R18W, W-1/2Sec.16, T8N,R19W,SBM, Calif. F.A. Hyde & Co. last assignee
	78135	1/14/58	Base:Sec.36, T9N,R17W,SBM, Calif. 640A. App.states 320 A.used in Salt Lake 05354, No.983100
Asgd. to Tucson Title Ins. Co. on 2/14/61 See previous recordation Misc. No. 76136	79043	4/8/58	Base: E-1/2NE-1/4,N-1/2 SE-1/4 Sec.21,T1N, R4E,BHM,S.Dak.
See previous recordation See Misc. No. 76644	47-76644	2/18/59	Base:NE-1/4. NE-1/4NW-1/4 Sec.16,T6N, R18E,MDM,Calif. See Coeur d' Alene 01039
Quitclaim deed issued See Misc. 73260. See previous recordation --Misc. No. 76643	NOT VALID 47-76643	2/18/59	Base: S-1/2 NW-1/4,N-1/2 SE-1/4 Sec.35, T19N,R5E,G&SRM Ariz.See Misc. 73260 Ore 011230
See previous recordation Misc. No. 76109 Not Valid--See Riverside 03512	76109 & L.S. 0165126	11/15/60	Base: E-1/2 NW-1/4 Sec.29, T26S,R33E, MDM,Calif.
See prior recordation Misc. No. 79043 Used in Arizona 033330	88169 & Ariz. 030861	10/17/61	Base: E-1/2 NE-1/4,N-1/2 SE-1/4 Sec.21, T1N,R4E,BHM, S.Dak.Rec'd. for record. 8/11/61,c/w Ariz.030861
See prior recordation Misc. No. 76120	47-76120	5/6/62	Base: SE-1/4 Sec.27, T18N, R4E, G&SRM, Arizona

Cert. No.	Name and Address of Claimants	Acreage
Abstract of Title #3768	E. L. Cord 200 Court Street Reno, Nevada	83.17
Abstract of Title #4775	" "	40.00
Abstract of Title #3163	" "	160.00
Abstract of Title #2142	" "	160.00
Abstract of Title #4749	" "	40.00
Abstract of Title #4143	" "	80.00
Abstract of Title #2327	" "	240.00
Abstract of Title #4234	" "	40.00

Assignment	Misc. No.	Date Rec.	Remarks
See prior recordation Misc. 75727	88359	6/21/62	Base: Pt.SE-1/4 NW-1/4,N-1/2 SE-1/4.SE-1/4 SE-1/4 Sec.1, T21N,R5E,G&SRM Ariz.So.r/w of AT&SF RR
See prior recordation Misc. 75727 NOT VALID	88359	6/21/62	Base:SW-1/4 NW-1/4 Sec.33, T20N,R5E,G&SRM Ariz.Quitclaim deed San.Fe Pac. RR 7/31/56 See Misc.70081
See prior recordation Misc. 75727,Asgd. Edw. Newhoff 11/11/56, See Misc. 47-88359	88359	6/21/62	Base: SE-1/4SI1, T16N,R8E,G&SRM Ariz. Pat'd to A&P RR, No re-conveyance shown
See prior recordation Misc. 75727	88359	6/21/62	Base: NE-1/4 Sec.27,T22N, R9E,G&SRM,Ariz. Quit claim deed San.Fe Pac.RR 6/27/56,See. Misc.70116
See prior recordation Misc. 75728	88359	6/21/62	Base: NW-1/4 SW-1/4 Sec.29, T20N,R5E,G&SRM Ariz.Quitclaim deed San.Fe.Pac. RR.7/31/56,See Misc. 70081
See prior recordation Misc. 75728	88359	6/21/62	Base: S-1/2 SE-1/4 Sec.21, T20N,R6E,G&SRM Arizona
See prior recordation Misc. 75734	88359	6/21/62	Base: N-1/2SE-1/4 Sec.16,T2N, R10W,& Lot 2 of NW-1/4 Sec.2, T4N,R10W,all SBM,Calif.
See prior recordation Misc. 75734	88359	6/21/62	Base:SE-1/NE-1/4 Sec.17,T19N, R5E,G&SRM,Ariz.. Quitclaim deed San.Fe.Pac.RR 6/27756 See Misc.70116

Cert. No.	Name and Address of Claimant	Acreage
Abstract of Title #3434	E. L. Cord 200 Court Street Reno, Nevada	80.00
Abstract of Title #3233	" "	80.00
Abstract of Title #3134	" "	160.00
Abstract of Title #4989	Scrip Nevada, a limited partnership, c/o Maurice R. Barnes, Atty. at Law Munsey Bldg, Washington,D.C.	40.00
Coeur d'Alene 013863	George E. Rubedew 175 Beacon Hill Drive Longview, Washington	320.00
Coeur d'Alene 013863	Andrew J. Luckey 228 South 4th Street Las Vegas, Nevada	320.00
Coeur d'Alene 013863	William D. Embry, Sr., et al 2213 Sunrise Ave., Apt. 2 Las Vegas, Nevada	320.00
Coeur d'Alene 013862	George E. Rubedew 175 Beacon Hill Drive Longview, Washington	80.00

Assignment	Misc. No.	Date Rec.	Remarks
See prior recordation' Misc. 75734	88359	6/21/62	Base: S-1/2SE-1/4 Sec.25, T19N,R7E,G&SRM Ariz.no reconveyance shown No bases for claim.
See prior recordation Misc. 75734	88359	6/21/62	Base:N-1/2NE-1/4 Sec.23,T 18N,R8E,G&SRM Ariz.Quitclaim deed San.Fe Pac RR 12/8/55 see Misc 69032
See prior recordation Misc. 75734	88359	6/21/62	Base:NW-1/4 Sec.31,T19N,R 6E,G&SRM,Ariz. Quitclaim deed San.Fe Pac.RR 10/11/56 See Misc. 71311
See prior recordation Misc. 76494	47-76494	4/24/63	Base:NW-1/4NE-1/4 Sec.29,T 29N,R2E,G&SRM Arizona
See prior recordation Misc. 76218, Quitclaim to George L. Ramsey, See Coeur d'Alene 013863,Asgd. to Luckey 1175/63	47-76218	1/9/64	Base: N-1/2 Sec.21,T.28S, R32E,MDM,Calif.
See prior recordation Misc. 47-76218 Asgd. Wm.Embrey, et al. See Misc. 47-76218 Quitclaimed to Ramsey-Coeur d'Alene 013863	47-76218	1/9/64	Base: N-1/2 Sec.21,T.28S, R32E, MDM, Calif.
See prior recordation Misc. 47-76218 Quitclaimed to Ramsey See Coeur d'Alene 013863	47-76218	1/9/64	Base: N-1/2 Sec.21,T28S, R32E,MDM, Calif.
See prior recordation Misc. 47-76219 Quitclaimed to F.A.Hyde &Co. See Coeur d'Alene 013862 Asgd. to Andrew J. Luckey See Misc. 47-76219	47-76219	1/9/64	Base: E-1/2 SW-1/4, Sec.36 T16S,R31E,MDM Calif.

Cert. No.	Name and Address of Claimant	Acreage
Coeur d'Alene 013862	Andrew J. Luckey 228 South 4th Street Las Vegas, Nevada	80.00
Coeur d'Alene 013862	William D. Embry, Sr. et al 2213 Sunrise Avenue, Apt. 2 Las Vegas, Nevada	80.00
Coeur d'Alene 013851	George E. Rubedew 175 Beacon Hill Drive Longview, Washington	40.00
Coeur d'Alene 013851	Andrew J. Lcukey 228 South 4th Street Las Vegas, Nevada	40.00
Coeur d'Alene 013852	George E. Rubedew 175 Beacon Hill Drive Longview, Washington	192.65
Coeur d'Alene 013852	Andrew J. Luckey 228 South 4th Street Las Vegas, Nevada	192.65
Coeur d'Alene 013861	George E. Rubedew 175 Beacon Hill Drive Longview, Washington	80.00

Assignment	Misc. No.	Date Rec.	Remarks
See prior recordation Misc. 47-76219 Quit-claimed to F.A.Hyde Co. See Coeur d'Alene 013862 Asgd. Wm.D.Embry, et al See Misc. 47-76219	47-76219	1/9/64	Base: E-1/2 SW-1/4 Sec.36, T16S,R31E, MDM,Calif.
See prior recordation Misc. No. 47-76219 Quitclaimed to F.A.Hyde Co. See Coeur d'Alene 013862	47-76219	1/9/64	Base: E-1/2 SW-1/4 Sec.36, T16S,R31E, MDM,Calif.
See prior recordation Misc. 76236, Quitclaim to J.W.Belden. See Coeur d'Alene 013851 Asgd. Andrew J. Luckey 11/5/63 See 47-76236	47-76236	2/19/64	Base: NW-1/4 NE-1/4 Sec.16, T13S,R31E, MDM,Calif.
See prior recordation Misc. 47-76236 Quitclaimed J.W.Belden See Coeur d'Alene 013851	47-76236	2/19/64	Base: NW-1/4 NE-1/4 Sec.16, T13S,T31E, MDM,Calif.
See prior recordation Misc. 76220 Quitclaim J.R.Johnston See Coeur d'Alene 013852 Asgd. Andrew J. Luckey 11/5/63 Misc.47-76220	47-76220	2/19/64	Base: W-1/2SE Sec.32,T5N,R15W Lots 3.4. SW-1/4NE-1/4 Sec. 5,T4N,R15W, SBM,Calif.
See prior recordation Misc. 47-76220 Quit-claimed to J.R.Johnston See Coeur d'Alene 013852	47-76220	2/19/64	Base:W-1/2SE-1/4 Sec.32,T5N, R15W,Lots 3,4, SW-1/4NE-1/4 Sec.5,T4N,R15W, SBM,Calif.
See prior recordation Misc. 76238 Quitclaim Wm. V & Nora S. Head,See Coeur d'Alene 013861.Asgd. Andrew J. Luckey 11/5/62 See Misc. 47-76238	47-76238	2/19/64	Base: E-1/2 SW-1/4 Sec.35, T1N, R20E. W.M.,Oregon

Cert. No.	Name and Address of Claimant	Acreage
Coeur d'Alene 013861	Andrew J. Luckey 228 South 4th Street Room 301 Las Vegas, Nevada	80.00
Coeur d'Alene 013860	George E. Rubedew 175 Beacon Hill Drive Longview, Washington	80.00
Coeur d'Alene 013860	Andrew J. Luckey 228 South 4th Street Room 301 Las Vegas, Nevada	80.00
Abstract of Title #3163	Edward D. Newhoff 2485 Huntington Drive San Marino, California	160.00

Assignment	Misc. No.	Date Rec.	Remarks
See prior recordation Misc. 47-76238 Quit-claimed Wm.V.& Nora Head See Coeur d'Alene 013861	47-76238	2/19/64	Base: E-1/2 SW-1/4 Sec.35, T1N,R20E, W.M.,Oregon
See prior recordation Misc. 76217 Quitclaim F.A.Hyde & Co. See Coeur d'Alene 013860.Asgd.Andrew J. Luckey 11/5/63 See Misc. 47-76217	47-76217	2/19/64	Base: S-1/2 NW-1/4 Sec.16, T5N,R21W, SBM,Calif.
See prior recordation Misc. 47-76217 Quit-claimed F.A.Hyde & Co. See Coeur d'Alene 013860	47-76217	2/19/64	Base: S-1/2 NW-1/4 Sec.16, T5N, R21W, SBM,Calif.
See prior recordation Misc. 88359	47-88359	12/12/65	Base: SE-1/4 Sec.11,T16N, R8E,G&SRM Ariz.Pat'd to A&P RR Co.

APPENDIX H

Record of unpublished cases, Director, Bureau of Land Management, with respect to Lieu Selection Rights under the Act of July 1, 1898 (30 Stat. 597, 602). This category of Lieu Selection Rights concerns the Northern Pacific Railway Company. The record shows all of the rights recorded under the Recordation Act of August 5, 1955 (69 Stat. 534) and the action taken by the Department with respect to said rights.

Cert. No.	Name and Address of Claimant	Acreage
None	Charles Wecks Route 1, Box 216 Troutdale, Oregon	40.00
None	Greta Elwert Box 347 Portland 7, Oregon	41.30
None	James J. O'Keane 529 Builders Exchange Bldg. Portland 4, Oregon	24.62
None	" " "	31.44
None	Nelson A. Gertulla 8420 S. E. Mill Street Portland, Oregon	40.00
None	Jack E. Carl 2533 S. E. Else Avenue Portland, Oregon	40.00
Seattle 03580	Donald R. Wheeler, Trustee 161 West Holt Avenue Pomona, California	40.00
Seattle 03580	" " "	28.78
Seattle 02622	" " "	40.00

Assignment	Misc. No.	Date Rec.	Remarks
Asgd. to Ferris F. Boothe--See Misc. No. 78769	73433	10/9/56	Base: SENE Sec. 27,T2N,R21E,WM. See letter "F" 1/22/08-HE4866
	73482	10/18/56	Base:Lots 1,2, E-1/2NW Sec.7, T2N,R5E,W.M. Wash.169.22A, 127.92 A used Nev.Sec.2,T27S R11W,W.M.Ore.
Asgd. to Ferris F. Boothe--See Misc. No. 78970	73214	10/22/56	Base: See Roseburg 07609 & Wash.01125 O'Keane,atty in fact for widow of C.E. Moulton
Asgd. to Ferris F. Boothe--See Misc. No. 78971	73583	10/24/56	Base:see Vancouver F.O. 4708-See u/so Wash.01125
Asgd. to Ferris F. Boothe on 3/9/1965 See Misc. 47-73595	73595	10/30/56	Base: see H.E. 10827 Vancouver See also Wash. 01153 SE-1/4 SE-1/4 Sec.35 T4N,R19E,W.M. Wash.
Asgd. to A. W. Spoo on 1/11/1966--See Misc. No. 47-73904	73904	11/30/56	Base:SENE Sec. 13,T3N,R16E, W.M.,Wash.See also Wash.0651
Asgd. to Linn Land Co.--See Misc. No. 84004	76133	6/28/57	Base: NE-1/4 SE-1/4 Sec.5, T20N, R9E, W.M.,Wash.
Asgd. to Linn Land Co.--See Misc. No. 84003	76116	6/28/57	Base: SE-1/4 NE-1/4 Sec.5, T20N,R9E,W.M. Wash.
Asgd. to Linn Land Co.--See Misc. No. 84006	76117	6/28/57	Base: SE-1/4 NE-1/4 Sec.21, T27N,R9E., W.M.,Wash.

Cert. No.	Name and Address of Claimant	Acreage
Seattle 03580	Donald R. Wheeler, Trustee 161 West Holt Avenue Pomona, California	37.14
B.L.M. 014400	Lloyd K. Johnson 517 Torrey Bldg. Duluth, Minnesota	7.07
G.L.O. 08868 Gt.Falls 084366	Frank A. Pachmayr and others 1220 South Grand Avenue Los Angeles 15, California	4.99
Oregon 05427	Tura Baker c/o Eldon J. Fairbanks and Eldon J. Fairbanks 2111 Galbreth Road Pasadena, California	40.00
Oregon 05520	Thos. D. Snyder and Louise M. Snyder 2461 Las Lunas Pasadena, California	36.92
Oregon 05467	Vieco Manufacturing Co., Inc., Trustee 845 Olive Street Inglewood, California	40.00
Oregon 05486	Tura Baker c/o Eldon J. Fairbanks and Eldon J. Fairbanks 2111 Galbreth Road Pasadena, California	40.00
Spokane 04849	The Collins Land Co. Helena, Montana	4.08

Assignment	Misc. No.	Date Rec.	Remarks
Asgd. to Linn Land Co. See Misc. No. 84005	76118	6/28/57	Base: Lot 1 Sec. 5,T20N, R9E, W.M., Wash.
	76237	7/15/57	Base: Unused residue ofSE-1/4NE-1/4 Sec. 5,T20N,R9E, W.M.Wash,See Seattle 03580
Asgd. to Richard Cutbirth on 8/29/1962 See 47-76565	76565	7/31/57	Base: Unused residue of NE-1/4 Sec.7,T1N, R30E,W.M.Ore.
Asgd. to Switzer Land Company See Misc. 84002	76547	7/31/57	Base:NW-1/4 SE-1/4 Sec.5, T20N,R9E,W.M. Wash.formerly Seattle 04328
Asgd. Linn Land Co. See Misc. 84001	76549	7/31/57	Base: Lot 2 Sec.5,T20N, R9E.,E.M.Wn.
Asgd. to Casper Joseph Schmand --See Misc. No. 85681	76550	7/31/57	Base: SW-1/4 NE-1/4 Sec.5, T20N, R9E, W.M.,Wash.
Asgd. to Linn Land Company--See Misc. No. 84007	76551	7/31/57	Base: SW-1/4 SE-1/4 Sec.5, T20N, T9E, W.M.,Wash.See Seattle 04328
	76363	8/5/57	Base: Unused residue ofNE-1/4NE-1/4 Sec. 12, T5N,R17E, & Lots 1,2,3, Sec. 7, T5N, T18E.,W.M. Wash.

Cert. No.	Name and Address of Claimant	Acreage
G.L.O. 05427	The Collins Land Co. Helena, Montana	5.35
None	Ferris F. Boothe Attorney at Law 1200 Cascade Building Portland 4, Oregon	40.00
None	" " "	24.62
None	" " "	31.44
Oregon 05520	Linn Land Company 525 Failing Building Portland 4, Oregon	36.92
Oregon 05427	Switzer Land Company 525 Failing Building Portland 4, Oregon	40.00
Seattle 03580	Linn Land Company 525 Failing Building Portland 4, Oregon	28.78

Assignment	Misc. No.	Date Rec.	Remarks
	76368	8/5/57	Base: Unused residue of SW-1/4 Sec.27,T5N, R15E,W.M., Wash.
See prior recordation Misc. No. 73433 See ES 1893	PAID 78969	4/4/58	Base: SENE Sec. 27,T2N,R21E,WM. Ore. See letter "F" of 1/22/08 H.E.4866
See prior recordation Misc. No. 73214 See ES1894 for 16.06A remaining. Used 8.56A Wash.03649-pat'd.	PAID 78970	4/4/58	Base: See Roseburg 01609 & Wash. 01125,N-1/2NE-1/4,NE-1/4 NW-1/4 Sec.15, T8N,R2E,W.M.Wn.
See prior recordation Misc. No. 73583 Used Wash. 03649 pat'd 2/23/66	PATENTED 78971	4/4/58	Base: See Vancouver F.C.4708 and Washington 01125
See prior recordation Misc. No. 76549	PAID 84001	12/1/59	Base: Lot 2 Sec.5,T20N,R9E, W.M.,Wash. See ES1879
See prior recordation Misc. No. 76547 Reused to Casper Joseph Schmand--See Misc. No. 85650	84002	12/1/59	Base: NWSE Sec. 5,T20N,R9E,W.M. Wash,formerly in Seattle 04328
See prior recordation Misc. No. 76116	PAID 84003	12/1/59	Base: SENE Sec. 5, T20N,R9E, W.M.Wash. See ES1878

Cert No.	Name and Address of Claimant	Acreage
Seattle 03580	Linn Land Company 525 Failing Building Portland 4, Oregon	40.00
Seattle 03580	Linn Land Company 525 Failing Building Portland 4, Oregon	37.14
Seattle 02622	Linn Land Company 525 Failing Building Portland 4, Oregon	40.00
Oregon 05486	Linn Land Company 525 Failing Building Portland 4, Oregon	40.00
Seattle 04328	Casper Joseph Schmand c/o Pierce M. Rice Corbett Building Portland 4, Oregon	40.00
Seattle 04328	Casper Joseph Schmand c/o Pierce M. Rice Corbett Building Portland 4, Oregon	40.00
G.L.O. 05868 Great Falls 084366	Richard Cutbirth, by Andrew J. Luckey 914 Bridger Avenue Las Vegas, Nevada	4.99
None	Ferris F. Boothe, Atty at Law 1200 Ico Building 520 S. W. Sixth Avenue Portland, Oregon 97204	40.00

Assignment	Misc. No.	Date Rec.	Remarks
See prior recordation Misc. No. 76133	PAID 84004	12/1/59	Base: NESE Sec.5,T20N, R9E,W.M.Wash. See ES1877
See prior recordation Misc. No. 76118	PAID 84005	12/1/59	Base: Lot 1 Sec.5,T20N, R9E,W.M.Wash. See ES1876
See prior recordation Misc. No. 76117	PAID 84006	12/1/59	Base: SENE Sec.21, T27N, R9E,W.M.Wash. See ES1875
See prior recordation Misc. No. 76551 See ES1874	PAID 84007	12/1/59	Base: SWSE Sec.5, T20N, R9E,W.M.Wash. See Seattle 04328
See prior recordation Misc. No. 84002 Trfd. to Equity Funding Corp.9/19/66 Misc. 47-85680	85680	6/29/60	Base: NW-1/4 SE-1/4 Sec.5, T20N,R9E,W.M. Wash.
See prior recordation Misc. No. 76550 Trfd. to Equity Funding Corp.9/19/66 See Misc. 47-85681	85681	6/29/60	Base: SW-1/4 NE-1/4 Sec.5, T20N,R9E,W.M. Wash. See Ore. 05467
See prior recordation Misc. No. 76565	47-76565	1/10/63	Base: Unused residue of NE-1/4 Sec.7,T1N, R30E,W.M.Ore.
See prior recordation Misc. No. 73595 See ES1895	47-73595 PAID	3/29/65	Base: SE-1/4 SE-1/4 Sec.35, T4N,R19E,W.M. Washington

Cert. No.	Name and Address of Claimant	Acreage
None	A. W. Spoo P.O. Box 183 Loma Linda, California 92354	40.00
None	George Rodda, Jr. P.O.Box 309 Corona del Mar, California and George A. Evans 1411 SunReme Drive Pacific Palisades, California	40.00
Seattle 04328	Equity Funding Corp. of America 9601 Wilshire Boulevard Beverly Hills, California	40.00
Seattle 04328	Equity Funding Corp. of America 9601 Wilshire Boulevard Beverly Hills, Falifornia	40.00

Assignment	Misc. No.	Date Rec.	Remarks
See prior recordation Misc. 47- Trfd. to George Rodda, Jr. & George A. Evans on 7/14/66. See 47-73904	47-73904	7/23/66	Base: SE-1/4 NE-1/4 Sec.13, T3N,R16E,W.M. Wash.
See prior recordation Misc. 47-73904 See ES1739	PAID 47-73904	9/8/66	Base: SE-1/4 NE-1/4 Sec.13, T3N,R16E,W.M. Wash.
See prior recordation Misc. No. 85681 See ES1784	PAID 47-85681	9/26/66	Base: SW-1/4 NE-1/4 Sec.5, T20N,R9E,W.M. Washington
See prior recordation Misc. No. 85680 See ES1785	PAID 47-85680	9/26/66	Base: NWSE Sec. 5,T20N, R9E,W.M.Wash.

SUPREME COURT, U. S. No. 983 FEB 1 1968

In the Supreme Court of the United States

OCTOBER TERM, 1967

BATTLE MOUNTAIN COMPANY, PETITIONER

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
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CLYDE O. MARTZ,
Assistant Attorney General,

ROGER P. MARQUIS,
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Attorneys,
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Washington, D. C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 385 F. 2d 90. The opinion of the district court (Pet. App. A14-A28) is reported at 255 F. Supp. 382. The opinion of the Secretary of the Interior (Pet. App. A28-A32) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1967. A timely petition for rehearing

was filed on November 14, 1967, and denied on November 28, 1967. The petition for a writ of certiorari was filed on January 2, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether under the Act of June 4, 1897, rights to select public lands in lieu of those located in a national forest reserve were unassignable, and were extinguished when the forest lands were reconveyed to the party who had originally deeded them to the United States.

STATEMENT

In 1898, the San Francisco Mountains Forest Reserve was established in what is now the State of Arizona. Since earlier grants of land in the forest reserve area to the predecessor of the Sante Fe Pacific Railroad had left only alternative sections available for the reserve, an exchange was arranged under the Act of June 4, 1897, 30 Stat. 36, whereby Santa Fe relinquished its lands in the forest reserve in return for the right to "select in lieu thereof a tract of vacant land open to settlement * * *."

In 1915, Santa Fe executed two powers of attorney authorizing its attorneys-in-fact to exercise its right to select 160 acres of public lands in lieu of certain tracts relinquished in the San Francisco Mountains Reserve (Pet. App. A3). In 1956, Santa Fe, believing the 1915 powers of attorney had been lost, requested that the base lands be quitclaimed back to it

pursuant to the Act of April 28, 1930, 46 Stat. 257, 43 U.S.C. 872 (Pet. App. A34). This deed was executed by the Director of the Bureau of Land Management on October 12, 1956.

On January 12, 1961, petitioner filed an application with the Secretary of the Interior to select certain land in Oregon in lieu of those relinquished by Santa Fe in 1901 and produced the two 1915 powers of attorney authorizing it to act for the Santa Fe Pacific Railroad [1] (Pet. App. A29-A30). The Secretary rejected petitioner's application on the ground that the selection rights originally granted to Santa Fe were not assignable and that the in lieu selection rights were extinguished when the original land was reconveyed to Santa Fe in 1956 (Pet. App. A31-A32).

The district court reversed the Secretary, holding that the two 1915 powers of attorney had created assignable "scrip rights" which gave them a validity independent of the equities between the United States and Santa Fe (Pet. App. A19-A21, A27-A28). On appeal, the Ninth Circuit reversed, holding that the Secretary's consistent interpretation of the Act of June 4, 1897, as creating only exchange rights between the United States and the original owner or his agent, and not assignable "scrip rights," was a reasonable administrative construction of the statute which should be accepted by the courts (Pet. App. A13).

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[1] Subsequent to the reconveyance of the original land to Santa Fe, on August 7, 1957, these powers of attorney had been recorded with the Bureau of Land Management pursuant to the Act of August 5, 1955, 69 Stat. 534, 43 U.S.C. 274, note.

ARGUMENT

The only issue presented by this case is whether under the Act of June 4, 1897 the right to select land in lieu of forest land conveyed to the United States is a right which can be exercised only by the original landowner or whether the right is a freely assignable "scrip right."

The Secretary of the Interior has consistently construed the 1897 Act as creating only a right between the United States and the relinquishing landowner. Thus, shortly after the passage of the Act of June 4, 1897, the Secretary [2] issued an opinion that the statute "does not provide for the issuance of scrip in any form." Opinion of August 26, 1898, 28 L.D. 472. The history of the administrative construction of the 1897 legislation and the reasons for it were summarized in the Secretary's decision in *George L. Ramsey, by Ted E. Collins*, 58 I.D. 272, at pp. 294-295:

> As to this statute [Act of June 4, 1897], a fundamental point to be noted is that according to a long line of decisions the act contemplated *an exchange between two owners* and that nothing in it can be construed as indicating that it envisaged any other or different character of transaction. From the beginning however dealers and speculators in public land rights have persisted in treating the exchange right as scrip, a floating, assignable right, and have made persistent efforts to persuade the Department to this view. But the Department early decided that no

[2] In a letter prepared by Assistant Attorney General Willis Van Devanter.

> floating right was intended by the Congress; that this law does not provide for the issuance of scrip in any form or for the certification of a right of selection; and that to speak of a "scrip right" or "scrip land" under this legislation is inaccurate and tends to confuse and mislead.
>
> Under the act the Department had no power to *prevent* assignment and scrip treatment of the exchange right by its owner * * *. But it could and did *refuse to recognize assignments and assignees.* [Emphasis in original.]

The court below was clearly correct in holding that there was no reason to overturn this consistent construction of the statute by the "officers or agency charged with its administration". *Udall* v. *Tallman*, 380 U.S. 1, 16; see *Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316, 324-325.[3]

We note also that the issue presented by this case will not have substantial future significance. Approximately 5,000 acres of in lieu selection rights under the Act of June 4, 1897, were recorded with the Department of the Interior pursuant to the Act of August 5, 1955, 69 Stat. 534, 43 U.S.C. 274, note (Pet. App. A60-A-83), and only about 500 acres of in lieu selection rights were recorded under the Act of July 1, 1898, 30 Stat. 597, 620. Many of these land claims

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[3] Petitioner cites no case, either of this Court or any court of appeals, holding that in lieu selection rights under the Act of June 4, 1897, are assignable. While petitioner does cite *Begue* v. *Grizzly Live Stock & Land Co.*, 1 F. Supp. 229 (S.D. Cal.), as judicial recognition of the assignability of these selection rights (Pet. 7), the refusal of the Ninth Circuit in this case to follow that decision by one of its district courts leaves that opinion without validity as a precedent.

have already been satisfied either by quitclaims, patents or payment under the provisions of the Act of August 31, 1964, 78 Stat. 751, 43 U.S.C. 274, note. Since it is the intent of the Act of August 31, 1964, that all of these claims be disposed of by 1970, the acreage potentially affected by the decision below is diminishing rapidly.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.

CLYDE O. MARTZ,
Assistant Attorney General.

ROGER P. MARQUIS,
A. DONALD MILEUR,
Attorneys.

FEBRUARY 1968.

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